

From: [David Tofsted](#)
To: [Lange, Dylan, SOS; rules, sos, SOS](#)
Subject: [EXT] Comments Regarding Newly Proposed SoS Rule Changes to Elections Code
Date: Wednesday, August 26, 2020 1:27:28 PM

To Whom It May Concern,

With regards to the upcoming meeting on Election Code changes, several issues should be clarified prior to publication or implementation of said proposed rules (1.10.15) changes.

1. First, with regard to the proposed rules of 1.10.15, the statutory authority listed in [1.10.15.3](#) indicates these proposed changes are based on Sections 1-2-1 and 1-12-72 of the Election Code.

Section 1-2-1 does indeed provide the authority for the Secretary of State (hereafter SoS) to "make rules pursuant to the provisions of, and necessary to carry out the purposes of, the Election Code." This provides the **rationale** for the proposed rules changes. Then, it is reference to 1-12-72 that provides the **substance** or **basis** that justifies the proposed changes.

Yet a search of the new legislation (SB 004) passed in the 2020 special legislative session does not include the word "challenger" at all. But if this word is missing from the proposed language of SB 004, and thereby of the new Section 1-12-72, there is no justification for the newly proposed sub-Sections [1.10.15.9](#) and [1.10.15.10](#), which are entitled "Interposing Election Challenges" and "Absent Voter Election Board; Challenges; Disposition," respectively.

Perhaps these new sections were simply rewordings or (effectively) consolidations of previous portions of the code, but such reworked or reworded sections have then not been properly cited in the statutory authorization statement. This would need to be revised.

Conversely, if these new sections add new restrictions or rights to poll challengers that are outside the bounds of the current code, then they have no basis of justification provided by the legislature and must not be implemented since the SoS is an executive branch position and not permitted to enact legislation. This is the job and obligation of the legislature alone.

2. Secondly, according to paragraph B. (2) of the cited Section 1-2-1 of the Election Code, no proposed rule change may be "adopted or amended within ... sixty-three days before a primary or a general election."

I argue that we are currently well within 63 days of the beginning of the next general election. While Friday the 28th of August (the date of the hearing) is still 67 days from Election Day, that is not what the statute says. It says from the "general election." In person voting in the election begins on the 6th of October in Dona Ana County at our county building. That is 39 days from Friday's hearing date.

According to the code, the county clerk may begin mailing out absentee ballots as early as the 6th of October, and begin receiving those ballot envelopes back within a few days. Yet the procedures detailed in subSection [1.10.15.8](#) are related to the actions of the county clerk's staff upon receiving returned absentee ballot packets, and these activities would surely begin to occur sooner than 63 days from Friday. In fact, they would likely begin occurring within the next 47 days, not 63 days.

Since the number of absentee voters is expected to be on the order of 25% of all votes cast (or more), it is to be expected that the procedures allowing county clerks to initiate their absentee voter boards (AVBs) two weeks before election day the activities described in subSections [1.10.15.9](#) and [1.10.15.10](#) could begin as early as the 20th of October, which is 53 days from this Friday's hearing date. So, again, the procedures described in these two subsections would again need to be implemented prior to the 63 day margin described in the Election Code.

Here is a second reason for it being illegal to adopt these rules prior to this election.

3. According to subSection [1.10.15.2](#) the scope of these proposed rules changes would make these rules applicable to all future elections. Also, according to subSection [1.10.15.4](#) the duration of these proposed rules is indicated to be permanent. Further, according to subSection [1.10.15.3](#), the justification for these rules changes is indicated to be 1-12-72 of the Elections Code. Yet according to paragraph 1-12-72.A this section of the code is ONLY applicable to the 2020 general election. Therefore, both the language used in the scope and the duration subSections of 1.10.15 appear to be illegally attempting to expand the application of the rules of 1-12-72 beyond the scope of the related legislation that is the very justification of these proposed rules changes.

4. However, these proposed rules changes could have addressed a clear gap in the new Section 1-12-72. That gap appears in the form of coverage of the duties of the poll challengers with respect to the tasks assigned to the county clerk's agents in Section [1.10.15.8](#) in the proposed rules and as a similar charge appears in paragraph 1-12-72.J of the SB 004 legislation.

To wit - 1-12-72.J "Upon receipt of a mailed ballot, the county clerk shall remove the privacy flap to verify that the voter signed the official mailing envelope and confirm that the last four digits of the social security number provided by the voter matches the information on the voter's certificate of registration. Etc."

Formerly this process was performed by the Absentee Voter Board, but they are not mentioned in this legislation.

Now, in oral debate prior to the passage of SB 004 in the NM House, Rep. Greg Nibert specifically asked the legislation spokeswoman Rep. Linda Trujillo whether poll challengers would have access to all activities related to the handling of the incoming absentee ballot packets. Rep. Trujillo indicated that this would, indeed, be a transparent process. That poll challengers would have full access.

Clearly, the act of removing the privacy flaps on the backs of the returning ballot packet outer envelopes is a critical component of the voter verification process. If anything, the new requirement that the voter supply the last 4 digits of their social security number is a marked improvement on the old method of merely supplying a Year-of-Birth, since that information could be gleaned from the voter rolls.

In a perfect world we would not need voter boards at all, or poll challengers. We would simply return our ballots and no checking would be necessary. In a perfect world the actions of the county clerk or their employees in examining what information was contained underneath these privacy flaps would not be problematic without oversight by poll challengers. But this is not a perfect world.

Since the county clerk's agents in charge of inspecting the information beneath the privacy flaps would need to be able to KNOW whether a proper 4-digit SSN had been provided, therefore they must be SUPPLIED with this information by the clerk's office itself. And therefore there is a potential problem where if this information is missing or incorrect an unscrupulous clerk's employee might simply fill in the missing information.

Therefore, it is imperative, based on the criticality of this task, that poll challengers have access to this process.

Yet while the methods and means of getting challengers in to the workings of this process was left completely out of the SB 004 legislation, we have Rep. Trujillo's promise that something would be done to ensure this is a possibility.

Therefore, any implementation paragraph (such as [1.10.15.8](#)) should include the means of access for poll challengers.

In particular, (1) since this activity is conducted separately from the Absentee Voter Board, there is no "presiding judge" for the challenger to present their credential to. (2) Also, because there is no AVB present, the hours of operation when these procedures would occur are not specified, or the place. (3) And since there is no AVB there is no presiding judge to raise a challenge to, or quorum of judges to vote, or (4) a procedure to follow should the clerk's agent ignore the stated requirements of [1.10.15.8](#).

This, along with the late date of these proposed rules changes, suggests the SoS must issue ad hoc guidance for handling these incoming absentee ballot packets, or to simply read paragraph J as referring to the AVB itself to implement these checks beneath the privacy flaps.

Sincerely,
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