

Michigan Office of Administrative Hearings and Rules
Administrative Rules Division (ARD)

MOAHR-Rules@michigan.gov

REQUEST FOR RULEMAKING (RFR)

1. Department:

State

2. Bureau:

Elections & Campaign Finance

3. Promulgation type:

Full Process

4. Title of proposed rule set:

Conduct of Election Recounts

5. Rule numbers or rule set range of numbers:

R 168.901- R 168.930

6. Estimated time frame:

6 months

Name of person filling out RFR:

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7. Describe the general purpose of these rules, including any problems the changes are intended to address.

The purpose of these rules is to update the terminology to account for technological and procedural changes since the rules were promulgated in 1979. The rules will also be updated to conform with current legal requirements and current practices.

8. Please cite the specific promulgation authority for the rules (i.e. department director, commission, board, etc.).

Board of State Canvassers.

“The said board of state canvassers shall prescribe the time and the place in each county where the recount of any votes shall be conducted, which recount shall be in public. Said board shall provide each board of county canvassers with such rules and regulations as in the opinion of the said board of state canvassers shall be necessary to conduct such recount in a fair, impartial and uniform manner in the said several counties. Observance of such rules and regulations shall be enforced by said board or its representatives hereinafter provided for.” MCL 168.889.

“The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.” Const 1963, art 2, §7(5).

“A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.” Const 1963, art 2, §7(6).

A. Please list all applicable statutory references (MCLs, Executive Orders, etc.).

MCL 168.889.

B. Are the rules mandated by any applicable constitutional or statutory provision? If so, please explain.

Yes. MCL 168.889, above, requires the Board of State Canvassers to provide “such rules and regulations” as the Board deems necessary. The Board initially promulgated these rules in 1979.

9. Please describe the extent to which the rules conflict with or duplicate similar rules, compliance requirements, or other standards adopted at the state, regional, or federal level.

The rules do not conflict with any similar rules, requirements, or standards. The proposed rules clarify certain aspects of the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, specifically Chapter XXXIII addressing Recounts, MCL 168.861 to 168.894. The rules also incorporate changes based on recent amendments to Michigan’s constitution, specifically Const 1963, art 2, §7 (amendments incorporated due to the passage of proposal 2022-2, effective 12-24-2022), and changes to Michigan election law, 1954 PA 116, MCL 168.1 to 168.992, specifically Chapter XXXIII addressing Recounts, sections MCL 168.861 to 168.894.

10. Is the subject matter of the rules currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda?

Yes. Included in Recount Under the Authority of the Board of State Canvassers instructions issued for the Proposal 2022-2 and 2022-3 recounts.

11. Are the rules listed on the department’s annual regulatory plan as rules to be processed for the current year?

Yes.

12. Will the proposed rules be promulgated under Section 44 of the Administrative Procedures Act, 1969 PA 306, MCL 24.244, or under the full rulemaking process?

Full Process

13. Please describe the extent to which the rules exceed similar regulations, compliance requirements, or other standards adopted at the state, regional, or federal level.

Currently, precincts are often deemed “unrecountable” whenever a seal is broken or does not match the seal number indicated in the poll book, or when the number of ballots in a ballot container does not align with the number of ballots issued on Election Day as shown on the poll list, including in situations where the reason for the discrepancy is explained in the poll book. While current statute allows a precinct to be recounted if the discrepancy is “explained to the satisfaction of the board of canvassers[.]” MCL 168.871, that provision has rarely been used. The proposed rules would make clear that precincts should be recounted whenever possible, except in those situations where a discrepancy cannot be explained.

Additionally, the rules currently account for the recount of Election Day and absent voter ballots. Given the adoption of Proposal 2022-2 into the Constitution and relevant implementing legislation, recount procedures also need to account for the recount of votes cast at early voting sites.

14. Do the rules incorporate the recommendations received from the public regarding any complaints or comments regarding the rules? If yes, please explain.

The proposed rules were shared with the Board of State Canvassers and 4 county clerks (as county clerks conduct recounts with the Board of State Canvassers). No changes were requested by either group.

15. If amending an existing rule set, please provide the date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors have changed the regulatory activity covered by the rules since the last evaluation.

The proposed rules do amend existing rules. The rules were promulgated in 1979 and have not been amended since. They do not account for advances in technology such as electronic voting systems and electronic pollbooks, both of which must be taken into account for vote tabulation and recounts. The current rules also sanction some procedures that are no longer part of the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992. Specifically, procedures based on former MCL 168.802, which was repealed by 2018 PA 120, effective 12-31-18, and former MCL 168.737, which was repealed by 2012 PA 128, effective 5-14-12.

16. Are there any changes or developments since implementation that demonstrate there is no continued need for the rules, or any portion of the rules?

Yes. Since the rules’ implementation in 1979, several changes to Michigan Election law, 1954 PA 116, MCL 168.1 to 168.992, have rendered some rules obsolete as they reflect procedures that are inconsistent with the law and no longer used. The draft will rescind rules that are no longer applicable given subsequent changes to election law, specifically, the current rules include procedures based on former MCL 168.802, which was repealed by 2018 PA 120, effective 12-31-18, and former MCL 168.737, which was repealed by 2012 PA 128, effective 5-14-12.

17. Is there an applicable decision record (as defined in MCL 24.203(6) and required by MCL 24.239(2))? If so, please attach the decision record.

No

Based on the information provided in this RFR, MOAHR concludes that there are sufficient policy and legal bases for approving the RFR. The RFR satisfies the requirements of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328, and Executive Order No. 2019-6.