PROPOSED REGULATION OF

THE SECRETARY OF STATE

LCB File No. R111-21

December 20, 2021

EXPLANATION – Matter in *italics* is new; matter in brackets **[omitted material]** is material to be omitted.

AUTHORITY: §§ 1-3, NRS 293.124, 293.247, 293.3677 and 293B.105.

A REGULATION relating to elections; setting forth certain requirements relating to testing and
certifying ballot marking devices; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law authorizes the board of county commissioners of any county to purchase and
adopt for use at elections any mechanical voting system and mechanical recording device. (NRS
293B.105) A "mechanical voting system" is a system of voting whereby a voter may cast a vote:
(1) on a device which mechanically or electronically compiles a total of the number of votes cast
for each candidate and for or against each measure voted on; or (2) by marking a paper ballot
which is subsequently counted on an electronic tabulator, counting device or computer. (NRS
293B.033)

Existing regulations require the county clerk in a county using a mechanical voting
system to conduct certain tests before and after each election to ensure that each mechanical
recording device which directly records votes electronically will accurately record the votes cast
for all offices and on all measures. (NAC 293B.090) **Section 2** of this regulation requires that the
county clerk also test each ballot marking device, which is defined in **section 1** of this regulation
as a device that allows a registered voter to mark a paper ballot which is subsequently counted on
an electronic tabulator, counting device or computer.

Existing regulations require that before each election cycle for federal office, each county
clerk is required to certify that the operating systems installed on each mechanical recording
device have been certified by the Voting System Certification and Laboratory Accreditation
Program of the Election Assistance Commission. (NAC 293B.110) **Section 3** of this regulation:
(1) updates the name of the Program and relevant citation to federal law; and (2) requires the
county clerk to also certify the operating systems installed on each ballot marking device.
Section 3 further requires these certifications to be done before each election.

Section 1. NAC 293B.010 is hereby amended to read as follows:

293B.010   As used in this chapter, unless the context otherwise requires:

1. *"Ballot marking device" means a device which allows a registered voter to mark a paper ballot which is subsequently counted on an electronic tabulator, counting device or computer.*

2. "Firmware" means programming instructions that are stored in a read-only memory format within a mechanical recording device rather than being implemented through software.

[2.] **3.** "Mechanical recording device" has the meaning ascribed to it in NRS 293B.032.

[3.] **4.** "Mechanical voting system" has the meaning ascribed to it in NRS 293B.033.

[4.] **5.** "Results cartridge" means a cartridge which contains the electronically recorded ballots cast during the election and from which the ballots are tabulated.

[5.] **6.** "Voter verifiable paper audit trail printer" or "VVPAT" means the device attached to a mechanical recording device and the paper it prints to record all votes cast by a voter for any and all candidates and for or against any and all measures, enabling that voter to visually verify that the mechanical voting system accurately recorded the votes of the voter.

Sec. 2. NAC 293B.090 is hereby amended to read as follows:

293B.090   1.   [Before] *Not earlier than 2 weeks before, and not later than 5 p.m. on the day before, the first day of early voting,* and after each election, as provided in NRS 293B.140 to 293B.170, inclusive, the county clerk in a county using a mechanical voting system shall ensure that each mechanical recording device which directly records votes electronically, *each ballot marking device,* each VVPAT and the automatic tabulating equipment and programs to be used in the election will accurately *mark or* record *, as applicable,* the votes cast for all offices and on all measures by completing the tests required pursuant to this section and chapter 293B of NRS.

2.   A county clerk shall, in the course of performing the other tests of the system, conduct a test to ascertain that the VVPAT correctly records on the paper record the selection made on the

mechanical voting device for all offices and all measures on the ballot. If a county clerk is required to conduct an election in more than one language, the test ballots must be processed in each required language.

3. A county clerk shall conduct the test required pursuant to subsection 2 by:

(a) Processing on a mechanical recording device, during the periods prescribed in NRS 293B.150 and 293B.165, a group of logic and accuracy test ballots voted so as to record:

(1) A vote for each candidate and a vote for and against each measure on the ballot;

(2) A vote for "None of these candidates" for all statewide contests;

(3) "No selection made" for each contest and ballot measure; and

(4) In all contests in which a voter may vote for more than one candidate, each option available to the voter, from "No selection made" to the total number of candidates a voter may select.

(b) Comparing the paper record with the contests and candidate names required to be on the ballot to ensure the paper record is accurately recording and reflecting the selections made on the mechanical recording device.

4. If any error is detected during the test required pursuant to subsection 2, the error must be immediately reported to the Secretary of State. The cause of the error must be ascertained and corrected and an errorless count must be made before the particular mechanical recording device or VVPAT is approved for use in the election or certified for accuracy in the official counting of the ballots.

5. A vote is properly cast on a mechanical recording device which directly records votes electronically when:

(a) The voter selects his or her choice;

(b) The mechanical voting system verifies the selection of the voter;

(c) The voter submits his or her selections; and

(d) The mechanical voting system verifies that the selections have been submitted.

6. Each mechanical recording device which directly records votes electronically must include:

(a) Instructions for casting a vote;

(b) A method for a voter to select his or her vote in each contest;

(c) A method for a voter to change his or her selection;

(d) A visual verification of the selections made by the voter for each contest;

(e) A visual notice to the voter if the voter has not made a selection in a contest or if the voter has undervoted in a contest in which the voter may select more than one candidate;

(f) Protection from an overvote;

(g) A method for the voter to review his or her selections and make changes before the ballot is cast;

(h) A notice advising the voter to confirm his or her selections before casting his or her ballot and informing the voter that casting the ballot is irrevocable;

(i) A verification that the vote has been cast;

(j) A paper record of each vote that is cast; and

(k) An electronic record of each ballot stored by the mechanical voting system.

7. A mechanical recording device which directly records votes electronically must create a trail for an audit of the mechanical voting system which substantiates that:

(a) Only ballots cast by authorized voters have been included in the tally list;

(b) All ballots have been unmodified since they were cast;

(c) All ballots cast have been accounted for; and

(d) The results of the tabulation of the ballots have been correctly accumulated from the ballots of the authorized voters and are capable of repetition with the same results.

8.   Persons authorized to observe the tests conducted pursuant to NRS 293B.150 and 293B.165 must not interfere with the conduct of such tests. The results of the tests conducted pursuant to this section are confidential pursuant to NRS 293B.155.

Sec. 3.   NAC 293B.110 is hereby amended to read as follows:

293B.110   1.   [Before each election cycle for federal office,] *Not earlier than 2 weeks before, and not later than 5 p.m. on the day before, the first day of early voting,* in accordance with procedures established by the Secretary of State, each county clerk shall certify that:

(a) The software used to tabulate ballots; and

(b) The operating systems, including, without limitation, software and firmware, installed on each mechanical recording device [,] *or ballot marking device,*

➥ have been certified by the Voting System *Testing and* Certification [and Laboratory Accreditation] Program of the Election Assistance Commission established pursuant to [42 U.S.C. § 15321.] *52 U.S.C. § 20921.*

2.   The county clerk shall certify the operating systems, including, without limitation, software and firmware, pursuant to subsection 1 by confirming that each component of such operating systems used pursuant to subsection 1 matches the identity registered with the National Software Reference Library.

3.   The date and time that the operating systems of each mechanical recording device *and ballot marking device* are certified pursuant to subsection 2 must be recorded, and, subject to the

provisions of subsection 4, an audit trail must be maintained from that date which sets forth each instance that the mechanical recording device *or ballot marking device* is accessed.

4.   The audit trail required pursuant to subsection 3 must include, without limitation:

(a) The name of the supervisor responsible for accessing the mechanical recording device {;} *or ballot marking device;*

(b) The reason for accessing the mechanical recording device {;} *or ballot marking device;* and

(c) The date and time that the accessing of the mechanical recording device *or ballot marking device* was completed.