

DEPARTMENT OF ELECTIONS
OFFICE OF THE STATE ELECTION COMMISSIONER
Statutory Authority: 15 Delaware Code, Section 5012A(f) (15 **Del.C.** §5012A(f))

FINAL

Order Adopting Department of Elections Regulation 101

101 Procedures for Addressing Post-Election Voting Machine Audit Discrepancies

IT IS HEREBY ORDERED, this 14th day of June 2021, that Regulation 101 (Procedures for Addressing Post-Election Voting Machine Audit Discrepancies) is adopted as a Regulation of the Department of Elections. This Regulation was published in the May 1, 2021 edition of the *Delaware Register of Regulations* and is incorporated herein by reference. The effective date of this Regulation is July 11, 2021. This Regulation is adopted by the Department of Elections in accordance with Title 15 of the Delaware Code and pursuant to the requirements of Chapters 11 and 101 of Title 29 of the Delaware Code, as follows:

1. Notice of the proposed Regulation and its complete text were published in the May 1, 2021 issue of the *Delaware Register of Regulations*. The Notice included, among other things, a summary of the proposed Regulation and invited interested persons to submit written comments to the Office of the State Election Commissioner on or before June 4, 2021. The Notice further stated that the proposed Regulation was available for inspection during regular business hours at the Office of the State Election Commissioner, 905 S. Governors Avenue, Suite 170, Dover, DE 19904, and that copies were available upon request.

2. No written comments concerning the proposed Regulation were received by the Department of Elections on or before June 4, 2021.

3. No changes were made to the Regulation as proposed and published in the May 2021 issue of the *Register* at page 987 (24 DE Reg. 987).

4. After review and consideration, the State Election Commissioner hereby adopts Regulation 101 as proposed.

Anthony Albence
State Election Commissioner

101 Procedures for Addressing Post-Election Voting Machine Audit Discrepancies

1.0 Purpose

This regulation is adopted by the Department of Elections pursuant to its authority under 15 **Del.C.** §5012(A)(f) and outlines the procedures to be followed by the Department of Elections in the case of a discrepancy discovered during a post-election audit performed in accordance with the provisions of 15 **Del.C.** Ch. 50A.

2.0 Applicability

This regulation applies to any post-election audit performed pursuant to 15 **Del.C.** §5012A by or on behalf of (and as authorized by) the Department of Elections, including any of its county offices through its appointed officials, merit employees, casual/seasonal employees, or temporary employees contracted via a third-party State-authorized vendor.

3.0 Definitions

For purposes of this regulation, the following words or terms shall have the meaning indicated:

"Audit" or "post-election audit" means the definition of "audit" as set forth in 15 **Del.C.** §5012A.

"Audit team" means appointed officials, merit employees, casual/seasonal employees, or temporary employees contracted via a third-party State-authorized vendor assigned and authorized by the State Election Commissioner to conduct a post-election audit.

"Certified election results" means the official results of a primary or school election certified by the State Election Commissioner following post-election review by Department of Elections staff, and the official results of a general or special election certified by the Board of Canvass as convened by the Superior Court in each of the three counties of the State.

"Department" means Delaware Department of Elections, including each of its three county offices and the Office of the State Election Commissioner

"Human-readable text" means the printed names of candidates or answers to ballot questions that may be read and reviewed by individuals during an audit or recount.

"Logic and accuracy test" means the testing undertaken following programming an election on a voting device to ensure accurate ballot marking and tabulation of results.

"Paper ballots" means the ballots of record marked and tabulated by voting machines during an election.

"Recount" means a manual recompilation of election results by examining the human-readable text printed on the ballot.

"State" means the State of Delaware.

"Voting device" means the device which marks and tabulates paper ballots during an election, which can include voting machines and absentee ballot tabulation equipment.

"Voting system" means all components associated with the programming, preparation, and testing of voting devices, the voting devices, and media used to store unofficial voting results tabulated by these devices.

4.0 Threshold for Specific Action

4.1 In the event that audit results from a component of the voting system does not agree with certified election results, and such discrepancy is greater than one half of one percent (0.5%) from the certified results totals, the following provisions shall be triggered:

4.1.1 Additional audits of the voting system exhibiting the discrepancy.

4.1.2 Additional testing and analysis of the voting system exhibiting the discrepancy.

5.0 Specific Actions to be Taken Once Threshold is Triggered

5.1 An additional audit of the ballots shall be conducted by an audit team distinct from the audit team that conducted the initial audit.

5.2 If a discrepancy of more than one half of one percent (0.5%) is unresolved following the action prescribed in subsection 5.1, the following additional actions shall be undertaken:

5.2.1 All documentation related to the voting system in question shall be gathered and reviewed by the audit team distinct from the audit team that conducted the initial audit and shall be preserved. These records include logic and accuracy testing, certification, and all other documentation.

5.2.2 A subsequent manual logic and accuracy test of the impacted voting device or voting devices shall be conducted, and the results shall be examined by a team of Department staff not involved in the conduct of the initial logic and accuracy test of the impacted voting device or voting devices.

5.2.3 An additional audit shall be initiated on another randomly selected voting device or voting devices used in the same election, to identify any similar discrepancies.

6.0 Corrective Actions by Department to Avoid Discrepancy in the Future

6.1 If an identified discrepancy is unresolved following the activities detailed in Section 5.0, the following shall occur:

6.1.1 The Department shall enlist the assistance of the State's voting system vendor to undertake additional testing and analysis.

6.1.2 The Department shall enlist the assistance of federal voting equipment certifying authorities to undertake additional testing and analysis that may entail the engagement of independent testing laboratories authorized by federal voting equipment certifying authorities to also undertake additional testing and analysis.

6.1.3 Any corrective actions identified must be certified by the federal voting equipment certifying authorities before being implemented by the Department.

6.1.4 Any corrective actions identified shall be implemented as soon as practical on all voting devices maintained by the Department.

6.1.5 Any voting devices and all associated components of the voting system used to prepare voting devices on which corrective actions have been undertaken shall undergo a complete logic and accuracy test before the voting devices are used in any subsequent election.

6.1.6 The results of the logic and accuracy test must demonstrate no discrepancy in vote tabulation before the voting device may be used in any subsequent elections.