

Rule-Making Cover Sheet

2018-234

TO: Secretary of State
ATTN: Administrative Procedure Officer,
State House Station 101, Augusta, Maine 04333.



- 1. Agency: Department of the Secretary of State, Bureau of Corporations, Elections and Commissions, Division of Elections
2. Agency umbrella and unit number: 29-250
3. Title of rule: Rules Establishing Procedures For Requesting And Conducting Recounts Of Elections Determined By Ranked-Choice Voting
4. Chapter number assigned to the rule: 536
5. Date(s)/method(s) of notice:
6. Date(s)/place(s) of hearing(s): Not applicable
7. Type: [X] new rule
8. Name/phone of agency contact person: Julie L. Flynn, 207-624-7736
9. If a major substantive rule under Title 5, c. 375, sub-CII-A, check one of the following: [] Provisional adoption, [] Final adoption, [] emergency adoption of major-substantive rule

10. Certification Statement: I, MATTHEW DUNLAP hereby certify that the attached is a true copy of the rule(s) described above and lawfully adopted by Dept. of the Secretary of State on 8. NOVEMBER 2018. I further certify that all portions of this rule are adopted in compliance with the requirements of the Maine Administrative Procedure Act. Signature: [Handwritten Signature] Printed name & title: MATTHEW DUNLAP, SECRETARY OF STATE

EFFECTIVE DATE: NOV 13 2018



11. Approved as to form and legality by the Attorney General on 11/8/2018.

(date)

Signature Nancy Maciowski

(original signature, personally signed by an Assistant Attorney General)

Printed Name: Nancy Maciowski

DEPARTMENT OF THE SECRETARY OF STATE
BUREAU OF CORPORATIONS, ELECTIONS AND COMMISSIONS
DIVISION OF ELECTIONS

Chapter 536: RULES ESTABLISHING PROCEDURES FOR REQUESTING AND
CONDUCTING RECOUNTS OF ELECTIONS DETERMINED BY RANKED-
CHOICE VOTING

SUMMARY: This rule sets forth the procedures for requesting and conducting recounts of elections that are determined by the process of ranked-choice voting, including the collection, security and handling of ballots, scheduling and staging the recounts, personnel, instructions, supervision, sorting and counting of first-choice votes and subsequent rankings, handling of disputed and challenged ballots, and final sign-off at the conclusion of the recount. To the extent applicable, this rule incorporates provisions of Chapter 502 governing recounts in elections determined by plurality.

SECTION 1. DEFINITIONS

1. **Candidate A.** “Candidate A” means the apparent winner in the final round of the ranked-choice vote counting process conducted pursuant to Title 21-A, section 723-A and Chapter 535 of the Department’s rules.
2. **Candidate B.** “Candidate B” means the requesting candidate in a recount involving the two candidates in the final round of ranked-choice counting, or the candidate with the second-highest ranking at the end of the penultimate round in a recount involving three candidates.
3. **Candidate C.** “Candidate C” means the requesting candidate who received the third-highest ranking at the end of the penultimate round of ranked-choice voting, in a recount involving three candidates.
4. **Preferred Candidate.** “Preferred Candidate” means the recount candidate who is ranked higher than the other recount candidates on a specific ballot, but who was not selected as the first choice.
5. **Recount Candidate.** “Recount candidate” means any candidate whose votes are being recounted in the recount process. A candidate must have received one of the three highest rankings in the penultimate round of ranked-choice vote counting in order to be a recount candidate.
6. **Requesting Candidate.** “Requesting candidate” means the candidate who submits the request for a recount.

SECTION 2. REQUESTING A RECOUNT

1. **Deadline to request.** Notwithstanding the deadline to request a recount under 21-A M.R.S.A. §737-A, Candidate B or C who is the apparent loser of an election determined by ranked-choice voting and who desires a recount must file with the Secretary of State a written, signed request for a recount, along with the applicable deposit, within 5 business days after the Secretary of State announces the official results of the ranked-choice voting count, pursuant to Chapter 535, section 6, subsection 4.
2. **Prohibited from requesting recount.** Candidates who did not receive one of the top three rankings at the end of the penultimate round of ranked-choice counting, and candidates who were defeated by batch elimination in any round or whose final vote totals based on the tally of first choice votes show it would be mathematically impossible for them to win may not request a recount.

SECTION 3. DEPOSIT FOR RECOUNT

1. **Deadline for payment of deposit.** The candidate requesting a recount must pay the deposit required by 21-A M.R.S.A. §737-A, sub-§1 or 1-A, as applicable, at the time the written and signed request for the recount is submitted to the Secretary of State, or after the estimated cost of performing the first stage of the recount is calculated, whichever occurs later. If Candidate C requests the recount, the deposit must be calculated based on the percentage difference between the total votes that Candidate C received in the penultimate round and the total votes received by the apparent winner in the penultimate round of ranked-choice voting.
2. **Multiple candidates requesting recount for same office.** If more than one candidate requests a recount for the same statewide or multicounty office, each candidate must pay a deposit, but the final cost of the recount will be shared among each requesting candidate for each stage in which they remain a participant in the recount.
3. **Form of payment for deposit.** Payment must be in the form of a check or money order.

SECTION 4. PREPARATION FOR RECOUNTS

1. **Designating State Recount Personnel**
 - A. **Recount Supervisor.** The recount will be conducted under the supervision of the Secretary of State, or his or her designee, who is called the Recount Supervisor. The Recount Supervisor will direct and oversee the conduct of the recount according to the laws, rules and procedures governing the conduct of the recount and the conduct of elections.
 - B. **Recount Assistants.** The Secretary of State will provide the necessary number of Department staff to act as Recount Assistants. The Recount Supervisor will assign one Recount Assistant to each counting team and will assign Recount Assistants to other tasks as necessary.

2. **Notice of Public Proceeding.** The recount is a public proceeding and members of the press and the general public may attend, although space may be limited. The Secretary of State will provide notice to the public regarding each recount, including information about scheduling.
3. **Collection and Storage of Ballots and Election Materials.** Upon receiving a request for a recount, the State Police will collect the ballots and other election materials as requested by the Secretary of State in accordance with this section of these rules. The State Police will deliver these materials to a secure storage area under the control of the State Police or the Secretary of State. The Recount Supervisor and Secretary of State staff will have access to the secure storage area to organize and log the materials prior to the start of the recounts. While the recounts are being conducted, the Recount Supervisor and Recount Assistants will maintain control over the ballots and other recount materials. No recount personnel will have access to the areas where ballots are stored unless accompanied by at least one other authorized person. At the conclusion of the recounts, the Recount Supervisor will return the recount materials to the secure storage area to be held until the materials are returned to the applicable municipalities by the State Police.
4. **Materials Available at the Recount**
 - A. **Automatic retrieval:** The State Police will retrieve the following materials which will be made available for inspection at the recount: the used state ballots, including voted and counted ballots; spoiled, defective and void ballots that were segregated and not counted; and envelopes containing challenge certificates.
 - B. **Staged retrieval:** For a recount of an election or nomination for a statewide or multi-county office, the Recount Supervisor may direct the State Police to retrieve ballots from certain designated voting jurisdictions so that the recount may be conducted in stages until the requesting candidate concedes or until all the ballots are recounted. In determining how to stage the retrieval and recounting of ballots, the Recount Supervisor will consider any requests that may be made by the recount candidates or their representatives regarding the selection or sequencing of voting jurisdictions to be recounted.
 - C. **Retrieval upon request:** The State Police will not retrieve unused state ballots, absentee envelopes and applications, incoming voting lists or any local ballots unless requested to do so by the Recount Supervisor. These materials will be collected if a recount of the used state ballots in any municipalities within the electoral district results in a significant discrepancy from the election night tally and makes it necessary to retrieve any or all of these election materials from those municipalities in order to reach a final tabulation and conclude the recount. The Recount Supervisor will make the determination regarding the collection of these additional materials, in consultation with the recount candidates or their representatives.
5. **Scheduling Recounts and Counters**
 - A. **Recount schedule.** The Recount Supervisor will set the schedule for the recounts. Each recount will begin promptly at the assigned time and will resume promptly after the time allotted for lunch and breaks has concluded. While recounts will normally be conducted during regular business hours, a recount

may be continued after 5 p.m. with the agreement of the participating candidates or their counsel. The Recount Supervisor has authority to continue the recount to the next available business day, however, even if the participating candidates or their counsel wish to continue the recount past 5 p.m.

- B. **Counters.** Each candidate will provide the number of counters required by the Recount Supervisor. At a minimum, six counters will be required for each candidate participating in the recount unless the Recount Supervisor determines that fewer counters are needed based on the number of ballots cast. If more than six counters are needed, the Recount Supervisor will notify the candidates or their representatives of the number of counters to be supplied. Candidates and certain other persons, as designated in 21-A M.R.S.A. §737-A, sub-§5, are prohibited from participating in the recounts in any capacity. It is not recommended that the counsel for a candidate act as a counter, although it is not prohibited.

SECTION 5. GENERAL PROCEDURES FOR RECOUNTS

1. **Security of the Recount Area.** There will be a guardrail enclosure set up to separate the recount area from the public viewing area. In addition to the State recount personnel, only the candidates' representatives or counsel, and the counters may be within the guardrail enclosure. All persons participating in the recount, including the Recount Supervisor and Recount Assistants, must sign in before the start of the recount, on a form provided by the Secretary of State. Candidates and members of the public must remain outside the guardrail area. Only limited conversation will be permitted in the recount room. Cell phones must be silenced during the recount and may be used within the guardrail area only by the Recount Supervisor or Recount Assistants as needed to conduct the recount. Any person who causes a disruption of the recount process may be removed from the room, at the discretion of the Recount Supervisor.
2. **Inspection of Materials**
 - A. **Prior to Counting.** Prior to the beginning of the recount, the candidates' representatives or counsel will be allowed within the guardrail enclosure to inspect the tamper-proof containers, locks and seals and to sign off on their condition.
 - B. **During the Recount.** Used (voted) ballots will be inspected and counted during the recount process as provided in subsection 4 below. Once the final count for a municipality has been determined, the voted ballots for that municipality will be resealed in tamper-proof containers, and will not be available for inspection again unless the Recount Supervisor later determines, after consultation with the candidates or their counsel, that re-inspection is necessary to resolve a factual dispute or question about the validity of the recount. If additional materials have been retrieved pursuant to section 4, subsection 4(C) of these rules, they may be inspected as follows:
 - (1) The containers of unused state ballots may be inspected immediately after that municipality's ballots have been counted, or they may be held for inspection until after all the ballots in the electoral district have been counted.

- (2) The incoming voting lists, absentee ballot envelopes and other election materials may be inspected upon request of one or both of the candidates or their counsel, or at the direction of the Recount Supervisor, after all the ballots in the electoral district have been counted and the Final Recount Tabulation has been prepared.
3. **Instructions.** At the start of the recount, the Recount Supervisor or designee will provide instruction to the participants on the laws and rules governing the recount process, ballot markings and the determination of voter intent.
4. **Ballot Handling and Counting Process**
 - A. **Access.** At no time will a candidate or the candidate's counters or representatives be permitted access to the ballots, incoming voting lists or other election materials without supervision or observation by the Recount Supervisor or Recount Assistants.
 - B. **Writing implements.** Only the purple pens or pencils provided by the Secretary of State will be used or allowed in the recount room.
 - C. **Counting teams.** Each counting team will include one counter for each candidate. Counters for each candidate will sit beside one another at a table, facing a Recount Assistant. Candidates' counters must remain at the tables during recount sessions, unless excused by the Recount Supervisor or Recount Assistant.
 - D. **Packaging.** Ballots will be unpacked and carried to the tables by the Recount Supervisor or Recount Assistants. At the completion of the counting session, the Recount Assistants will reseal the used (voted) ballots in the tamper-proof containers from that municipality or in any additional tamper-proof containers supplied by the Secretary of State.
 - E. **Hand-counted and machine-counted ballots.** Ballots from each municipality that were hand-counted on election night will be separated from their original lots and sorted and counted by hand for each recount candidate and within each municipality as described in sections 6 and 7 of this rule. Ballots that were machine-tabulated on election night also will be sorted and counted by hand for each recount candidate and within each municipality as described in sections 6 and 7 of this rule.
 - F. **Disputed ballots**
 - (1) Disputed ballots, as defined in Title 21-A, section 1, sub-§12, that are identified during the sorting and counting process described in sections 6 and 7 of this rule will be segregated as a single lot for each municipality.
 - (2) Before the candidate's counsel or representative signs the Municipal Tabulation form as described in paragraph I of this subsection, they may review the disputed ballots jointly and may resolve how the ballots should be sorted and counted. If the disputes are resolved, the votes on those ballots will be added to the municipal totals for the appropriate candidates. Prior to signing the Final Recount Tabulation pursuant to

section 8 of this rule, the candidates' counsels or representatives may review the disputed ballots jointly and may resolve how individual ballots will be counted, in which case the Final Recount Tabulation will be adjusted accordingly. Disputed ballots which are resolved before the Final Tabulation may be repacked and resealed with the other ballots.

- (3) A Disputed Ballot form indicating the candidate on whose behalf the ballot is being disputed, the grounds on which it is being disputed, the municipality, the alpha/numeric code for the counting team, and an identifying sequential number for the ballot will be prepared by the Recount Assistant or Recount Supervisor at the end of the recount, but only if there are enough disputed ballots to affect the result of the election.

G. **Absentee Ballot Envelopes Containing Ballots.** If, upon examination of absentee voting materials, absentee ballot envelopes appearing to contain ballots that were not removed from the envelope on election night are found, these ballots shall be dealt with in the manner described below:

- (1) Clerk's notes indicate ballot is okay to cast and absentee ballot envelope has been slit open, but ballots have not been removed: The ballot shall be removed from the envelope and put into an odd lot to count.
- (2) Clerk's notes indicate ballot is okay to cast and absentee ballot envelope has not been slit open: The ballot shall be segregated and not opened until after all other ballots in the electoral district have been counted. At that point, if it can be determined after checking the Incoming Voting List that the voter did not vote at the polls, the envelope shall be opened, and the ballot counted and added to the final count.

H. **Tally sheets.** Upon completion of each step in the recount process that requires tallying, as described in sections 6 and 7 of this rule, the Recount Assistant for the counting team will be responsible for completing the tally sheets and obtaining the signatures of each team member on the sheet. Each tally sheet will be labeled with the alpha code assigned to the counting team and consecutively numbered.

I. **Municipal tabulations.** After all the ballots have been counted for a municipality, the Recount Supervisor will provide the tabulation for that municipality to each candidate's counsel or representative on a Municipal Tabulation form. Each candidate's counsel or representative will be asked to sign the completed form agreeing to the final count for that municipality, including the number of ballots that remain in dispute. Once this is signed by or on behalf of both candidates, the used ballots will be resealed and neither the candidates nor their counsel will have access to these ballots again unless a factual dispute or question about the validity of the recount arises later in the recount process which the Recount Supervisor determines could be resolved by re-inspection. If one candidate is unwilling to agree to the final count for that municipality without first having an opportunity to inspect other election materials in accordance with section 4, subsection 4, paragraph C of this rule, then the Municipal Tabulation form may remain unsigned at this point in the process.

SECTION 6. PROCEDURES FOR RECOUNTS INVOLVING TWO CANDIDATES IN THE FINAL ROUND OF RANKED-CHOICE VOTING

This section sets forth the procedure for conducting a recount requested by Candidate B and involving the two continuing candidates in the final round of the ranked-choice counting process.

1. **Step 1 - Sort ballots by first choice votes.** On a municipality-by-municipality basis, or on a precinct-by-precinct basis within multi-precinct municipalities, the counting teams will sort the ballots into four groups, as follows:
 - A. Ballots with Candidate A marked as the first choice,
 - B. Ballots with Candidate B marked as the first choice,
 - C. Ballots with neither recount candidate marked as the first choice, and
 - D. Disputed ballots – ballots for which the members of the counting team cannot agree which candidate was selected by the voter.
2. **Step 2 – Count and record first choice votes.** Each grouping of first choice votes (Candidate A, Candidate B, neither and disputed) will be verified and counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the total of first choice votes for each grouping. After tallying, the ballots with first choice votes for Candidates A and B will be returned to the tamper-proof containers for the municipality or precinct within the municipality, as applicable. Ballots with no recount candidate selected as first choice will be processed in Step 3.
3. **Step 3 – Further sort ballots with no recount candidate selected as first choice.** Sort the ballots on which no recount candidate was selected as the first choice into three groups, as follows:
 - A. Ballots on which Candidate A is preferred over Candidate B,
 - B. Ballots on which Candidate B is preferred over Candidate A, and
 - C. Exhausted ballots (ballots on which neither Candidate A or B is ranked, and ballots which have an overvote or double-skipped ranking prior to the ranking for either Candidate A or B).
4. **Step 4 – Count and record ballots by grouping from Step 3.** Each grouping from Step 3 will be verified, then counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the totals for each grouping.
5. **Step 5 – Complete the Municipal Tabulation form.** On the Municipal Tabulation form, the counting team will record the total of first choice votes as determined in Step 2 and the total of preferred rankings for each candidate as determined in Step 4, and add those two numbers together to obtain each candidate’s total votes for the municipality. The counting team will add the number of exhausted ballots and any disputed ballots to obtain the total votes cast for the municipality. Each candidate’s counsel or representative will be asked to sign the Municipal Tabulation form at this point, pursuant to section 5, subsection 4, paragraph I. Before signing, they may review the disputed ballots jointly, as

described in section 5, subsection 4, paragraph F(2), and if the disputes are resolved the votes on those ballots will be added to the municipal totals for the appropriate candidates.

6. **Aggregate the municipal totals for the district-wide count.** When the ballots from all municipalities have been counted, the municipal totals will be aggregated into a statewide total, and Candidates A and B will be asked to sign the Final Recount Tabulation, as described in section 8 of this rule. If there are disputed ballots that are not resolved pursuant to section 5, subsection 4, paragraph F(2), a disputed ballot form must be completed for each of these ballots. If the requesting candidate concedes the recount before the ballots in all of the municipalities have been counted, the original ranked-choice vote count will be used as the Final Recount Tabulation.

SECTION 7. PROCEDURES FOR RECOUNTS INVOLVING THE THREE CANDIDATES IN THE PENULTIMATE ROUND OF RANKED-CHOICE VOTING

This section describes the procedure for conducting a recount involving the three continuing candidates in the penultimate round of the ranked-choice counting process when requested by Candidate C or by Candidates B and C.

1. **Step 1 - Sort ballots by first choice votes.** On a municipality-by-municipality basis, or on a precinct-by-precinct basis within multi-precinct municipalities, the counting teams will sort the ballots into five groups, as follows:
 - A. Ballots with Candidate A marked as the first choice,
 - B. Ballots with Candidate B marked as the first choice,
 - C. Ballots with Candidate C marked as the first choice,
 - D. Ballots with none of the recount candidates marked as the first choice, and
 - E. Disputed ballots – ballots for which the members of the counting team cannot agree which candidate was selected by the voter.
2. **Step 2 – Count and record first choice votes.** Each grouping of first choice votes (Candidate A, Candidate B, Candidate C, none and disputed) will be verified and counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the total of first choice votes for each grouping. After tallying, the ballots with first choice votes for Candidates A, B and C will be set aside. Ballots with no recount candidate selected as first choice will be processed in Step 3.
3. **Step 3 – Further sort ballots with no recount candidate selected as first choice.** Sort the ballots on which no recount candidate was selected as the first choice into three groups, as follows:
 - A. Ballots on which Candidate A is preferred over Candidates B and C,
 - B. Ballots on which Candidate B is preferred over Candidates A and C,
 - C. Ballots on which Candidate C is preferred over Candidates A and B, and

- D. Exhausted ballots (ballots on which neither Candidate A, B or C is ranked, or which have an overvote or double-skipped ranking prior to the highest ranking for Candidate A, B or C).
4. **Step 4 – Count and record ballots by grouping from Step 3.** Each grouping from Step 3 will be verified, then counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the totals for each grouping.
 5. **Step 5 – Complete the Municipal Tabulation form.** On the Municipal Tabulation form, the counting team will record the total first choice votes and the total of preferred rankings for each candidate as determined in Step 3, and add those two numbers together to obtain each candidate’s total votes for the municipality. The counting team will add the number of exhausted ballots and any disputed ballots to obtain the total votes cast for the municipality.
 6. **Step 6 – Sort Ballots Assigned to Candidate A.** Further sort all ballots assigned to Candidate A (either by first choice or by preference) based on the relative rank of Candidates B and C, as follows:
 - A. Ballots on which neither Candidate B nor Candidate C is ranked,
 - B. Ballots on which Candidate B is preferred over Candidate C, including ballots on which B was ranked but Candidate C was not ranked, and
 - C. Ballots on which Candidate C was preferred over Candidate B, including ballots on which Candidate C was ranked but Candidate B was not ranked.
 7. **Step 7 – Count and record ballots by grouping from Step 6.** Each grouping from Step 6 will be verified, then counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the totals for each grouping.
 8. **Step 8 – Sort Ballots Assigned to Candidate B.** Further sort all ballots assigned to Candidate B (either by first choice or by preference) based on the relative rank of Candidates A and C, as follows:
 - A. Ballots on which neither Candidate A nor Candidate C is ranked,
 - B. Ballots on which Candidate A is preferred over Candidate C, including ballots on which Candidate A was ranked but Candidate C was not ranked, and
 - C. Ballots on which Candidate C was preferred over Candidate A, including ballots on which Candidate C was ranked but Candidate A was not ranked.
 9. **Step 9 – Count and record ballots by grouping from Step 8.** Each grouping from Step 8 will be verified, then counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the totals for each grouping.
 10. **Step 10 – Sort Ballots Assigned to Candidate C.** Further sort all ballots assigned to Candidate C (either by first choice or by preference) based on the relative rank of Candidates A and B, as follows:
 - A. Ballots on which neither Candidate A nor Candidate B is ranked,

- B. Ballots on which Candidate A was preferred over Candidate B, including ballots on which A was ranked but B was not ranked, and
 - C. Ballots on which Candidate B was preferred over Candidate A, including ballots on which Candidate B was ranked but Candidate A was not ranked.
11. **Step 11 – Count and record ballots by grouping from Step 10.** Each grouping from Step 10 will be verified, then counted into lots of 50 to facilitate tallying. A tally sheet will be completed to record the totals for each grouping.
 12. **Step 12 – Complete the Municipal Tabulation form.** On the Municipal Tabulation form, record the relative ranking totals for each candidate tallied in Steps 7, 9 and 11 and verify that the totals for each candidate match the totals of first choice votes and preferred votes recorded in Step 5. Each candidate’s counsel or representative will be asked to sign the Municipal Tabulation form at this point, pursuant to section 5, subsection 4, paragraph I. Before signing, they may review the disputed ballots jointly, as described in section 5, subsection 4, paragraph F(2), and if the disputes are resolved the ballots will be added to the municipal totals for the appropriate candidates.
 13. **Aggregate the municipal totals for the district-wide count.** When the ballots from all the municipalities have been recounted, the municipal totals will be aggregated into a statewide total, and Candidates A, B and C will be asked to sign the Final Recount Tabulation, as described in section 8 of this rule. If there are disputed ballots that are not resolved pursuant to section 5, subsection 4, paragraph F(2), a disputed ballot form must be completed for each of these ballots. If the requesting candidate concedes the recount prior to counting the ballots from all municipalities, the original ranked-choice voting count will be used as the Final Recount Tabulation.

SECTION 8. RESOLUTION OF THE RECOUNT

1. **Final Recount Tabulation.** After the ballots from all the municipalities included in the recount have been recounted, and after the recount candidates or their counsel have had an opportunity to inspect other election materials if requested pursuant to section 4, subsection 4, paragraph C of this rule, the Recount Supervisor shall prepare a Final Recount Tabulation showing the sum of the final counts agreed to in each municipality, including the number of challenged ballots and ballots remaining in dispute. Each candidate, or their counsel or their representative, will then be required to sign the Municipal Tabulation for each municipality in the electoral district (if not already signed pursuant to section 5, subsection 4, paragraph I of this rule) and the Final Recount Tabulation. Once the recount candidates or their counsel have signed the Final Recount Tabulation, that becomes the final count for the election. If the number of challenged or disputed ballots included in the final count for the election is not enough to affect the result of the election, then the result of the election is determined by the Final Recount Tabulation.
2. **Appeal.** If the number of challenged or disputed ballots included in the final count for the election is enough to affect the result of the election, any recount candidate may appeal the recount as provided in Title 21-A, section 737-A, subsection 10. The result of the election will then be determined by the appeal. All election materials will be packaged, resealed and marked in accordance with Title 21-A, section 737-A, subsection 9.

3. **Withdrawal from Recount.** If a recount candidate wishes to withdraw from the recount at any time, the candidate may do so in writing, subject to the restrictions in 21-A M.R.S.A. §737-A, sub-§11.
-

STATUTORY AUTHORITY: 21-A M.R.S. §§ 723-A(5-A).

EFFECTIVE DATE:

June 20, 2018 – filing 2018-109 (EMERGENCY)

Blank

BASIS STATEMENT:

Adoption of this rule is necessary to specify procedures for a recount that are applicable to an election contest determined by ranked-choice voting (“RCV”) because that process is quite different from recount methods that apply to an election determined by plurality. The RCV statute, as enacted into law by a citizen’s initiative in November 2016, does not address recounts. Accordingly, a subsequent amendment, enacted as Chapter 316 of the Public Laws of 2017, “An Act to Implement Ranked-choice Voting in 2021,” directed the Secretary of State to adopt rules for requesting and conducting recounts in RCV elections. An emergency rule was adopted for the June 12, 2018 primary elections by RCV but has since expired. This rule is a modified version of the emergency rule and establishes the procedure for such recounts in the general election of November 2018 and beyond.

**Summary and Response to Comments Received for
Chapter 536: Rules Establishing the Procedures for Requesting and Conducting Recounts
of Elections Determined by Ranked-choice Voting**

Ann Luther, representing the League of Women Voters of Maine, was the only person who submitted comments related to this rule. She both spoke at the public hearing on September 17, 2018, and submitted comments in writing on September 27, 2018. Following is a summary of these comments, along with the Department's responses:

Overall comment:

The commenter recommends adding language to the rule indicating that no individual will have access to the ballots alone and that the public have an opportunity to monitor all access to the ballots when the containers are open.

Response:

With regard to the first part of the comment, we have added language to Section 4.3 specifying that no individual recount personnel will have access to the ballots alone. We believe the second part of the comment is adequately addressed in Section 5 of the rule, which describes the recount procedures that occur in public view.

Comment on Sections 1 and 2.2:

The commenter expresses concern that the rule limits the ability to request a recount to the three top candidates yet the statute does not contain such a limitation. The commenter acknowledges, however, that a recount requested by a candidate who was in fourth place based on the tally of first-choice votes at the municipal level would be a very complex endeavor. Indeed, the commenter recommends no change to the rule at this time and suggests that a statutory change may be appropriate.

Response:

The Secretary of State agrees that conducting a recount initiated by a candidate who was in fourth place based on the municipal tally of first-choice votes would be extremely complex to describe in a rule and equally difficult to implement. The statute is silent with respect to who may request a recount in a ranked-choice voting situation, and instead leaves to the Secretary of State the authority to adopt rules "for the proper and efficient administration of elections determined by ranked-choice voting" which rules "must include procedures, as determined appropriate by the Secretary of State, for requesting and conducting recounts of the results as determined in the rounds of [RCV] tabulation." 21-A M.R.S.A. §723-A(5-A). The Department believes the rule as proposed satisfies this obligation. Accordingly, we have not made any changes to the rule to expand the opportunity to request a recount.

Comment on Section 5.4.C:

This comment suggests changing the wording of the provision on counting teams to clarify that there will be one counter per candidate on each counting team. Since three candidates may be involved in the recount, the counters will not be “paired” to form a team.

Response:

The Department agrees and the suggested change in wording has been made in the final rule.

Comment on Section 6.1.D and 7.3.E:

Both of these paragraphs in the proposed rule included a reference to a referendum ballot, which the commenter suggested should be eliminated. The rule applies only to recounts of ranked-choice voting contests which, by definition, involve candidates not ballot questions.

Response:

We agree and have removed those references from these sections of the rule.

Comment on Section 6.5:

The commenter observed that the first sentence should be corrected to reference the steps in the process at which these tallies are made.

Response:

This provision of the rule has been corrected as suggested.

Comment on Section 7:

This comment suggests that the introductory sentence of Section 7 be rewritten to reflect that Candidates B and C may have requested a recount and Candidate B may contend that some ballots allocated to Candidate A when Candidate C was eliminated should have been allocated to Candidate B instead.

Response:

This is a valid point, and we have accepted the alternative wording offered.

Comment on Section 7.8

The commenter notes that the word “Candidate” should be inserted to modify “A” and “B” in this section, for consistency.

Response:

This omission was inadvertent and has been corrected in the final rule.

Comment on Section 7.13:

The comment highlights a portion of section 7.13 regarding review of disputed ballots by counsel for the candidates. The commenter questions whether this language is redundant, given the provision on disputed ballots in section 5.4.F.2, and therefore should be removed from section 7, or whether it should be repeated in section 6 for consistency.

Response:

The general provisions in section 5 include a subsection 4 discussing disputed ballots, which addresses the topic of resolving disputes. We have left that provision as is. Because sections 6 and 7 describe the actual counting and sorting of ballots, however, it is important to reiterate or cross reference those provisions at the stages in the process where the candidates' counsel or representatives will have opportunities to try to resolve disputed ballots. But we have inserted and rearranged some of the language in sections 6.5, 6.6, 7.12, and 7.13 to make them more closely parallel.

Other technical changes:

In the process of reviewing and responding to the comments summarized above, Department staff and counsel identified the need for some additional minor technical changes to achieve greater clarity and consistency. These changes include referring to "counting" rather than "recounting" ballots (*see* sections 5.4.E and 6.6), removing the word "upon" in sections 6.1.D and 7.1.E, removing the word "ballots" after "disputed" within the parenthetical in section 6.2, adding the phrase "and ballots" in section 6.3.C, and correcting the form of citation to other provisions of the rule in sections 5.4.I, 6.6, and 8.1.

Rule-Making Fact Sheet
(5 MRSA §8057-A)

AGENCY: **29-250**
DEPARTMENT OF THE SECRETARY OF STATE
BUREAU OF CORPORATIONS, ELECTIONS AND COMMISSIONS
DIVISION OF ELECTIONS

NAME, ADDRESS, PHONE NUMBER, E-MAIL OF AGENCY CONTACT PERSON:

Julie L. Flynn
101 State House Station
Augusta, ME 04333-0101
Phone: 207-624-7736
Fax: 207-287-5428
Email: julie.flynn@maine.gov

CHAPTER NUMBER AND RULE TITLE: **Chapter 536: RULES ESTABLISHING PROCEDURES FOR REQUESTING AND CONDUCTING RECOUNTS OF ELECTIONS DETERMINED BY RANKED-CHOICE VOTING**

STATUTORY AUTHORITY: 21-A M.R.S.A. §723-A, sub-§5-A

DATE, TIME AND PLACE OF PUBLIC HEARING: September 17, 2018, 1 p.m., Room 400 Burton Cross Building, 111 Sewall Street, Augusta

COMMENT DEADLINE: September 27, 2018

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [see §8057-A(1)(A)&(C)]

The ranked-choice voting statute requires the Secretary of State to adopt rules for requesting and conducting recounts of election results that are determined by the method of ranked-choice voting.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___ YES X NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [see §8057-A(1)(B)&(D)]

This rule sets forth the procedures for requesting and conducting recounts of elections that are determined by the process of ranked-choice voting. It includes procedures for the collection, security and handling of ballots, the sorting and counting of first choice votes and subsequent rankings, and handling of disputed and challenged ballots.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [see §§8057-A(1)(E) & 8063-B]

In developing this rule, the Department relied on the extensive experience and expertise of its staff in administering elections and recounts at the state and municipal level. In addition, the Department reviewed and

considered recommendations submitted by the League of Women Voters for how to conduct recounts of ranked-choice voting contests.

ESTIMATED FISCAL IMPACT OF THE RULE: [see §8057-A(1)(C)]

The cost to implement this rule is estimated to be in the range of \$100,000 to \$150,000 in any election with offices determined by ranked-choice voting where a recount is conducted, and there will be no fiscal impact if the candidate requesting the recount is required to pay the actual costs pursuant to 21-A M.R.S.A. § 737-A(1-A)(B).

FOR EXISTING RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:

ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:

[see §8057-A(2)(A)]

INDIVIDUALS, MAJOR INTEREST GROUPS AND TYPES OF BUSINESSES AFFECTED
AND HOW THEY WILL BE AFFECTED: [see §8057-A(2)(B)]

BENEFITS OF THE RULE: [see §8057-A(2)(C)]

Note: If necessary, additional pages may be used.

Administrative Procedure Act
CHECKLIST

Agency: **29-250**
DEPARTMENT OF THE SECRETARY OF STATE
BUREAU OF CORPORATIONS, ELECTIONS AND COMMISSIONS
DIVISION OF ELECTIONS

Chapter Number and Title of Rule: **Chapter 536: RULES ESTABLISHING PROCEDURES FOR REQUESTING AND CONDUCTING RECOUNTS OF ELECTIONS DETERMINED BY RANKED-CHOICE VOTING**

PROPOSED RULE:

1. Was this rule listed on the last regulatory agenda? Yes
2. Date of notification of: Anyone on mailing list: N/A

 Any trade, industry or
 professional group: N/A

 Any trade publications: N/A
3. Date Notice of Rulemaking Proposal (MAPA-3) sent to Secretary of State: N/A
4. Date Fact Sheet sent to Executive Director of Legislative Council: August 29, 2018
5. Date of publication in Secretary of State's rule-making ad.: August 29, 2018
6. Date of hearing(s): September 17, 2018 7. Comment deadline: September 27, 2018

ADOPTED RULE:

8. Was comment deadline extended or comment period reopened? N/A
If yes, date of second notice publication in Secretary of State's rule-making ad: _____
9. Is adopted rule consistent with what was proposed? Minor changes were made in response to comments.
(If not, please address the changes in the comments and responses section of your filing.)
10. Is the person signing the Certification Statement (MAPA-1, #9)
authorized to do so as stated in your statutes or in 5 MRSA, c.71? Yes
11. Was the rule adopted within 120 days of the comment deadline? Yes
12. Was the rule approved and signed by the Office of the
Attorney General within 150 days of the comment deadline? Yes
13. Is a Basis Statement included? Yes Is a copy of the Fact Sheet included? Yes

Are comments, with names and organizations, and your responses included? Yes

Notice of Agency Rule-making Adoption

AGENCY: 29-250

**DEPARTMENT OF THE SECRETARY OF STATE
BUREAU OF CORPORATIONS, ELECTIONS AND COMMISSIONS
DIVISION OF ELECTIONS**

CHAPTER NUMBER AND TITLE:

**Chapter 536: RULES ESTABLISHING PROCEDURES FOR REQUESTING AND CONDUCTING
RECOUNTS OF ELECTIONS DETERMINED BY RANKED-CHOICE VOTING**

ADOPTED RULE NUMBER:

2018-234

CONCISE SUMMARY: This rule sets forth the procedures for requesting and conducting recounts of elections that are determined by the process of ranked-choice voting, including the collection, security and handling of ballots, scheduling and staging the recounts, personnel, instructions, supervision, sorting and counting of first-choice votes and subsequent rankings, handling of disputed and challenged ballots, and final sign-off at the conclusion of the recount. To the extent applicable, this rule incorporates provisions of Chapter 502 governing recounts in elections determined by plurality.

EFFECTIVE DATE:

NOV 13 2018

(TO BE FILLED IN BY SECRETARY OF STATE)

AGENCY CONTACT PERSON:

Julie L. Flynn, Deputy Secretary of State

AGENCY NAME:

Bureau of Corporations, Elections and Commissions

ADDRESS:

101 State House Station

Augusta, ME 04333-0101

TELEPHONE:

(207) 624-7736

BASIS STATEMENT:

Adoption of this rule is necessary to specify procedures for a recount that are applicable to an election contest determined by ranked-choice voting ("RCV") because that process is quite different from recount methods that apply to an election determined by plurality. The RCV statute, as enacted into law by a citizen's initiative in November 2016, does not address recounts. Accordingly, a subsequent amendment, enacted as Chapter 316 of the Public Laws of 2017, "An Act to Implement Ranked-choice Voting in 2021," directed the Secretary of State to adopt rules for requesting and conducting recounts in RCV elections. An emergency rule was adopted for the June 12, 2018 primary elections by RCV but has since expired. This rule is a modified version of the emergency rule and establishes the procedure for such recounts in the general election of November 2018 and beyond.