

Date of Hearing: May 10, 2012

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Paul Fong, Chair

AB 1929 (Gorell) – As Amended: April 16, 2012

AS PROPOSED TO BE AMENDED

SUBJECT: Elections: casting ballots.

SUMMARY: Establishes processes and procedures for the review and approval of ballot marking systems, as defined, for use in California elections. Specifically, this bill:

- 1) Provides that a voting system does not include a mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking a ballot and is not connected at any time to a voting system.
- 2) Defines a ballot marking system as any mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking a ballot and not connected at any time to a voting system. Prohibits any online authorized ballot marking system from storing any voter identifiable selections on any remote server and prohibits the system from tabulating or having the capability to tabulate votes. Provides that it is unlawful for any provider of an online ballot marking system to permanently capture and store any ballot marking data derived from the process of marking a ballot.
- 3) Requires the Secretary of State (SOS) to study and adopt regulations governing the use of ballot marking systems.
- 4) Requires the vendor of a ballot marking system, no later than 10 business days after the SOS approves the use of that system, to send an exact copy of the approved source code for each component of the ballot marking system to be deposited into an approved escrow facility.
- 5) Establishes procedures for the review and approval of ballot marking systems. Prohibits the SOS from approving any ballot marking system, or part of a ballot marking system, unless it fulfills the requirements of this bill and the regulations established by the SOS.
- 6) Prohibits the SOS from approving any ballot marking system that permits a voter to exit a polling place with a facsimile of the ballot cast by that voter at that polling place.
- 7) Prohibits the use of a ballot marking system unless it has received the approval from the SOS prior to the election at which it is to be used. Prohibits any jurisdiction from purchasing or contracting for a ballot marking system, in whole or in part, unless that system has received approval from the SOS.
- 8) Permits a person or corporation owning or being interested in a ballot marking system to apply to the SOS to examine and report on its accuracy and efficiency to fulfill its purpose. Requires a vendor of such a system, upon and after submission of an application, to notify the SOS in writing of any known defect, fault, or failure of the hardware, software, or firmware of the ballot marking system or part of the system. Requires the SOS to submit a

report the United States Elections Assistance Commission (EAC) or its successor as soon as practicable regarding the problem submitted to the SOS by the vendor.

- 9) Defines the following terms, for the purposes of this bill:
 - a) "Defect" to mean any flaw in the hardware or documentation of an approved or conditionally approved ballot marking system that could result in a state of unfitness for use or nonconformance to the manufacturer's specifications.
 - b) "Failure" to mean a discrepancy between the external results of the operation of any software or firmware in an approved or conditionally approved ballot marking system and the manufacturer's product requirements for that software or firmware.
 - c) "Fault" to mean a step, process, or data definition in any software or firmware in an approved or conditionally approved ballot marking system that is incorrect under the manufacturer's program specification.
- 10) Permits the SOS to make all arrangements for the time and place to examine ballot marking systems proposed to be sold in California. Requires the SOS to furnish a report of the findings of the examining engineers to the Governor and the Attorney General.
- 11) Requires the SOS, prior to providing its decision on approval or withholding approval of a ballot marking system, to hold a public hearing to give interested persons an opportunity to express their views for or against the system. Requires the SOS to give notice of the hearing, as specified. Requires the SOS's decision to approve or withhold approval to be in writing and open to public inspection.
- 12) Requires the SOS to establish specifications for and the regulations governing ballot marking systems, and the related software. Requires the criteria for establishing the specifications and regulations to include, but not be limited to, the following:
 - a) Be suitable for the purpose for which it is intended;
 - b) Preserve the secrecy of the ballot; and,
 - c) Be safe from fraud or manipulation.
- 13) Requires the SOS, within 30 days after completing the examination of any ballot marking system, to place on file the report stating whether in his or her opinion the kind of ballot marking system examined can safely be used. Requires the report to contain a written or printed description and drawings and photographs clearly identifying the system and its operation.
- 14) Provides that if the report states that the ballot marking system can be used, the system is deemed approved by the SOS and systems of its kind may be adopted for use at elections.
- 15) Requires the SOS, within 10 days after filing a report, to send a copy to the board of the supervisors of each county.

- 16) Requires a vendor, upon approval of the ballot marking system, to notify the SOS and all local elections officials who use the system in writing of any defect, fault, or failure of the hardware, software, or firmware of the system or part of the system within 30 calendar days after the vendor learns of the defect, fault, or failure. Requires the SOS, upon receiving the vendor's written notification, to notify the EAC or its successor of the problem as soon as practicable regarding the problem submitted to the SOS by the vendor.
- 17) Prohibits a ballot marking system approved by the SOS from being changed or modified until the SOS has been notified in writing and determined that the change or modification does not impair its accuracy and efficiency sufficient to require reexamination and re-approval. Permits the SOS to adopt rules and regulations governing the procedures to be followed in making his or her determination as to whether the change or modification impairs accuracy or efficiency.
- 18) Permits the SOS to seek injunctive and administrative relief when a ballot marking system has been compromised by the addition or deletion of a hardware, software, or firmware without prior approval or is defective due to a known hardware, software, or firmware defect, fault, or failure that has not been disclosed as required under this bill.
- 19) Permits the SOS to seek all the following relief for an unauthorized change in hardware, software, or firmware in a ballot marking system approved or conditionally approved in California:
 - a) A civil penalty from the offending party or parties, not to exceed ten thousand dollars (\$10,000) per violation. Provides that each ballot marking system component found to contain the unauthorized hardware, software, or firmware is considered a separate violation. Requires a penalty imposed pursuant to this bill to be apportioned 50 percent to the county in which the violation occurred, if applicable, and 50 percent to the SOS for purposes of bolstering ballot marking system security efforts;
 - b) Immediate commencement of proceedings to withdraw approval for the ballot marking system in question;
 - c) A prohibition on the manufacturer or vendor of the ballot marking system from doing elections-related business in the state for one, two, or three years;
 - d) Refund of all moneys paid by a local agency for a ballot marking system or a part of a ballot marking system that is compromised by an unauthorized change or modification, whether or not the ballot marking system has been used in an election; and
 - e) Any other remedial actions authorized by law to prevent unjust enrichment of the offending party.
- 20) Permits the SOS to seek all of the following relief for a known but undisclosed defect, fault, or failure in a ballot marking system or part of a ballot marking system approved or conditionally approved in California:
 - a) Refund of all moneys paid by a local agency for a ballot marking system or part of a ballot marking system that is defective due to a known but undisclosed defect, fault, or

failure, whether or not the ballot marking system has been used in an election;

- b) A civil penalty from the offending party or parties, not to exceed fifty thousand dollars (\$50,000) per violation. Provides that each defect, fault, or failure is considered a separate violation. Provides that a defect, fault, or failure constitutes a single violation regardless of the number of ballot marking system units in which the defect, fault, or failure is found; and,
- c) An additional penalty of one thousand dollars (\$1,000) per day after the applicable deadline established in this bill for the offending party to disclose the defect, fault, or failure until the required disclosure is filed with the SOS.

21) Requires a penalty imposed pursuant to the provisions above to be deposited in the General Fund.

22) Requires the SOS, prior to seeking any measure of relief provided for in this bill, to hold a public hearing, as specified. Requires the SOS, at least 30 days prior to holding the hearing, to transmit a written notice of the hearing to each county elections official, offending party or parties, a person the SOS believes will be interested in the hearing, and a person who requests, in writing, notice of the hearing. Requires the decision of the SOS to seek relief under this bill to be in writing and state his or her findings and be open to public inspection.

23) Permits the SOS to seek injunctive relief requiring an elections official, or any vendor or manufacturer of a ballot marking system, to comply with the requirements of this bill, the regulations of the SOS, and the specifications for a ballot marking system, and its software, including the programs and procedures for vote marking and testing. Requires the venue for a proceeding under this bill to be exclusively in Sacramento County.

24) Requires a ballot marking system to comply with the following:

- a) Prohibits a ballot marking system or part of the system from storing any voter identifiable selections on any remote server and prohibits tabulation or the capability to tabulate votes. Prohibits any vendor of an online ballot marking system to permanently capture and store any ballot marking data derived from the process of marking a ballot.
- b) Prohibits a ballot marking system or part of the system from electronically receiving or transmitting election data through an exterior communication network, including the public telephone system, when the communication originates from or terminates at a polling place, satellite location, or counting center.
- c) Prohibits a ballot marking system or part of the system from transmitting election data or images via wireless communications or wireless data transfers when the communication originates from or terminates at a polling place, satellite location, or counting center.

25) Makes conforming changes.

EXISTING LAW:

- 1) Defines a "voting system" as any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both.
- 2) Prohibits a voting system or part of a voting system from being connected to the Internet at any time, or from electronically receiving or transmitting election data through an exterior communication network, including public telephone system, when the communication originates from or terminates at a polling place, satellite location, or counting center; or from receiving or transmitting wireless communications or wireless data transfers.
- 3) Prohibits a voting system, in whole or in part, from being used unless it has received the approval of the SOS prior to any election at which it is to be first used.
- 4) Prohibits a jurisdiction from purchasing or contracting for a voting system, in whole or in part, unless it has received the approval of the SOS.
- 5) Permits a person or corporation owning or being interested in a voting system or a part of a voting system to apply to the SOS to examine it and report on its accuracy and efficiency to fulfill its purpose.

FISCAL EFFECT: Keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) Proposed Amendments: In response to questions and concerns raised by committee staff and the SOS, the author has accepted and proposed a number of amendments to this bill. This analysis reflects those proposed amendments. The details of the proposed amendments are as follows:

- a) Clarify the Definition of Voting System: In order to avoid making changes to current law, which would result in a major policy change relating to voting systems, the author has proposed two amendments to this bill.

First, the author has agreed to amend the bill to clarify that a ballot marking system and its software used for the sole purpose of marking a ballot is not deemed a voting system.

Additionally, the author proposes an amendment, which creates and defines what it means to be a ballot marking system.

- b) Review of New Ballot Marking System: In order to address security concerns raised by committee staff and the SOS, the author has agreed to the following amendments.

First, in order to address concerns regarding the bill's lack of safeguards and safety measures to protect voter's private information and voting selections, the author has proposed amendments which prohibit a vendor from permanently storing voter identifiable selections on any remote server.

Additionally, the author has agreed to accept amendments, which prohibit a ballot marking system from being used in California unless it has received the approval of the SOS prior to any election at which it is to be used. The amendments establish processes and procedures for the review and approval of a ballot marking system, which are substantially similar to the review process already in place for voting systems.

2) Purpose of the Bill: According to the author:

The [Military and Overseas Voter Empowerment Act] gave California \$2 million in funding to implement the Department of Defense's Federal Voting Assistance Program, which seeks to assist overseas military with voting in local and national elections. The California Secretary of State is overseeing the implementation of this program.

The delays caused by the current voting system disenfranchises United States citizens who are serving in the military overseas because the current voting process often does not allow ballots to be received by election offices in time to be counted. It is vital to protect the constitutional right of all U.S. citizens to vote, particularly those who are risking their lives overseas in order to protect the freedom and rights of all US citizens. By utilizing the available technology today, we can ensure that our service men and women overseas can exercise their Constitutional right as U.S. citizens.

AB 1929 clarifies some of the definitions and terms within California's current election code to pave a path for a smooth implementation of a voting system that allows military overseas to electronically print their ballot and cast their vote via fax or mail. This would drastically speed up the amount of time it takes for military personnel overseas to cast their vote and ensures their votes are counted.

- 3) New Ballot Marking System: While the proposed amendments avoid making changes to the definition of a voting system, they do however create a new election-related policy. The proposed amendments contemplate authorizing the use of a new technology to assist in facilitating voting. The sponsor of this bill, Democracy Live, is a private company, which states they have developed an onscreen ballot marking device (also known as a ballot marking wizard) which allows a voter to electronically mark his or her ballot. The information marked on the voter's ballot is then temporarily captured and stored in order to allow for the transfer of information to be formatted onto a portable document format (pdf) that the voter may then print out and mail or fax to their county elections official. After the voter has printed his or her ballot, the information temporarily stored by Democracy Live is then purged. The author and sponsors argue that this system will help facilitate military and overseas voters by allowing them to more quickly obtain a ballot specific to the precinct in which they reside and clearly and concisely mark their ballot. A system, like the one described above, is not currently allowed for use in California elections.
- 4) Broad Application: The author and sponsor of the bill argue that the intent of the bill is to clarify the definition of "casting a ballot" to help facilitate voting for military, overseas and disabled voters. While this may be the proponents' intent, the bill in its present form does not accomplish the stated objectives and has much broader effects. For example, this bill is not limited to certain types or classes of voters, and as a result it would apply to *all* voters. If this bill were to be signed into law, it could potentially be used by significantly more voters than it was intended.

Although the proponents of this bill talk about the advantages of allowing voters other than overseas and military voters to return a ballot by facsimile, this bill does not authorize other voters to send their vote by mail (VBM) ballots via facsimile. If this bill were to be approved and signed into law, only those voters considered "special absentee voters" would be authorized to submit their ballot via facsimile.

The committee may wish to consider whether this bill accomplishes the proponents' intentions. Additionally, the committee may wish to consider adding language to narrow the scope of the bill to apply to military and overseas voters.

- 5) Additional Security Concerns: While the author has agreed to accept amendments proposed by the committee and the SOS to ensure the bill contains safeguards to protect a voter's private information and voting selections, a few security concerns remain. For instance, while the proposed amendments do explicitly prohibit any vendor of an online ballot marking system from *permanently* capturing or storing any ballot marking data derived from the process of marking the ballot, it still allows the information to be stored temporarily. Additionally, neither the bill nor the amendments prescribe when the data stored will be purged. As a result, temporarily stored data could theoretically still be vulnerable to manipulation. Furthermore, the bill and the proposed amendments contain no requirements for encryption, security or other safeguards to protect against the information being intercepted during transmission.
- 6) SOS Review Process: On the other hand, the author has agreed to accept a modified version of amendments proposed by the SOS, which prohibit a ballot marking system from being used in California unless it has received the approval of the SOS prior to any election at which it is to be used. The proposed amendments, which are substantially similar to the voting system review process in current law, establish the processes and procedures for the review and approval of a ballot marking system. Moreover, the proposed amendments provide the SOS with the authority to establish specifications for, and the regulations governing, the ballot marking systems to ensure it accomplishes the purpose for which it is intended, preserves the secrecy of the ballot, and ensures the system contains safeguards to protect from fraud or manipulation. If the ballot marking system does not meet the SOS's requirements, it will not be approved for use in California elections. The review process will help ensure a voter's private information and voting selections are protected.

There is, however, a notable difference with the ballot marking system review process. Unlike voting systems, ballot marking systems are not required to go through a federal test, review, and approval process. Because the federal EAC unofficially opined that "[b]allot marking wizards themselves do not serve a tabulation function," and would not meet the definition of a voting system as defined by the 2005 Voluntary Voting Systems Guidelines, a ballot marking system therefore would not be considered eligible for testing or certification under the federal EAC program.

- 7) Facilitating Voting: Over the last nine years, the Legislature has made a number of changes to state law to facilitate voting for military voters and other California residents who are outside of the United States. AB 188 (Maze), Chapter 347, Statutes of 2003, streamlined a number of provisions of state law to make it easier for overseas voters to receive their ballots and cast a vote. Among other provisions, AB 188 allowed *any* VBM ballot request received

from an overseas voter to be considered a request for voter registration; made all overseas voters permanent VBM voters; required that all overseas voters be mailed a VBM ballot 60 days before the election to ensure that the voter has sufficient time to receive, complete, and return his or her ballot; and allowed the elections official to send an overseas voter his or her ballot by electronic transmission.

AB 2941 (Bates), Chapter 821, Statutes of 2004, permitted special absentee voters who are temporarily living outside the United States to return their ballots by facsimile transmission. AB 2941 was intended to accommodate voters who, due to potential delays in international mail delivery and structural barriers present in combat areas, may not be able to receive, vote, and return a ballot in the 60-day period provided for overseas voters.

AB 2786 (Salas), Chapter 252, Statutes of 2008, extended the sunset date on the provisions of AB 2941 and AB 2369 (Block), Chapter 261, Statutes of 2010, removed the sunset date on the provisions of AB 2941 and made the program permanent.

Furthermore, at the federal level, in 2009, President Obama signed into law the Military and Overseas Voter Empowerment (MOVE) Act to expand the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which was established to protect the rights of service members to vote in federal elections regardless of where they are stationed. The MOVE Act builds on UOCAVA to provide greater protections for service members, their families, and other overseas citizens.

The provisions of the MOVE Act have been in effect since the November 2010 election. However, as mentioned above, California law already includes provisions to facilitate voting by military members and other California residents who are outside of the US, as such the SOS's office and local elections officials only had to make minimal adjustments to their practices in order to be in compliance. For example, the MOVE Act requires states to establish procedures to allow overseas voters to request voter registration applications and absentee ballot applications by mail or electronically, and requires at least one means of electronic communication for voters to request, and for all states to send, voter registration applications, absentee ballot applications, and voting information. As mentioned above, current law allows a special absentee voter to register to vote and apply for VBM ballot by facsimile transmission and allows elections officials to send a VBM ballot by mail, facsimile, or electronic transmission. Moreover, exceeding the requirements of the MOVE Act, current law also allows a special absentee voter who is temporarily living outside of the US to return his or her ballot by facsimile transmission.

- 8) What is the Urgency? As the committee is aware, it is a presidential election year and the primary is scheduled for June 5th while the general election is scheduled for November 6th. Should this bill be approved and signed into law, it is likely to be in place for the November election, due to the urgency clause. With the new circumstances and challenges surrounding our upcoming elections, which include the implementation of the "top two" primary system and the recent and upcoming United States Postal Service closures, the committee should consider whether adding a new untested and unproven method which allows a voter to electronically mark his or her ballot is prudent at this time. As such, the committee may wish to consider removing the urgency clause from this measure.

9) Proposed Technical Amendments: Committee staff suggests amending the bill to ensure the urgency clause is consistent with the bill's intent to apply to military *and* overseas voters. The committee staff recommends the following amendment. On page 2, line 17, after the word "disenfranchise," insert the following "*overseas voters and.*"

10) Arguments in Support: In support of this bill, California Council of the Blind, writes:

AB 1929 would, by modifying the definition of voting system, allow counties, without the need for prior approval by the Secretary of State, Californians to electronically mark their ballots without going to the polling place and then submit them either by mail or facsimile. Many Californians prefer to vote by mail. However, current law does not enable Californians who are blind or have low vision to vote in this manner without assistance in filling out their ballot. This bill would remove the legal impediment to this problem by allowing counties, if they so choose, to give voters who are blind or have low vision equal access to mail forms of balloting by marking the ballot electronically, just as they do at polling places. A county would be able to decide whether the specific type of electronic balloting technology would be sufficiently secure and, of course, the voter would need to provide the paper ballot to the county.

We would note, however, that the enactment of this measure should not be used as an excuse to close polling places or otherwise increase the impediments to voting at the polling place. Limiting the number of polling places is extremely burdensome for persons with visual impairments, most of whom are unable to drive. Fewer polling places means that it is more unlikely that person who are blind or have low vision will be able to access a polling place, either through walking or by public transit.

11) Arguments in Opposition: Verified Voting writes in opposition:

We understand you share this commitment to honor those who serve. Unfortunately, AB 1929 risks the opposite. AB 1929 seeks to redefine a voting system, allowing ballot marking systems, including online ballot marking software, to sidestep testing and certification. California has a long history of putting elections' integrity to the necessary tests, including causing systems to be thoroughly vetted, starting with requiring federal certification before approval at the State level. California also causes systems subsequently to be subject to escrow of software, pre-election testing, post-election tallies and making recounts easily available, among other provisions. California provides for a high degree of transparency for observers for each stage of the election, and is currently testing improved ways of post-election auditing for greater confidence in the outcome's accuracy. But AB 1929 seeks to cherry-pick elements of the voting system for a waiver of this important scrutiny and assurance; this is unwarranted for this system and a slippery slope for future systems, and we fear that lapse will disproportionately impact UOCAVA voters.

AB 1929 discusses both polling-place ballot marking systems as well as others such as online ballot marking systems, suggesting that neither should be subject to certification. Polling place ballot marking devices enable the use of a software system and some hardware as an interface to enable marking of the ballot, which then becomes the audit trail used in the count, the post election tally and any recounts. It should be noted that

these are already subject to federal testing and certification and a number of such systems have already been through this process for some years now.

Online ballot marking systems are essentially the same, with a few notable exceptions: first, online ballot marking software wizards use the voter's own computer for the hardware part of this interface, and this raises numerous concerns about the potential for malicious software on the voter's system that can never be scrutinized. Second, online ballot marking software by its nature is "online" and results in interactions that risk unwanted and even unknown scrutiny or worse of the voter's choices by external parties.

California voters have cause to believe the software may not be secure. The particular part of the software which acts to enable a voter to remotely mark a ballot online for subsequent printing gives us concern because it usually means data about voters' choices are rendered after a round trip to a remote server, and because that information may or may not render correctly in a bar-code which is usually incorporated as part of the printed ballot (at least in configurations we've learned about to date). In the event that a voter makes subsequent modifications to the printed ballot after it has been rendered, those won't be included; finally, the ballots are likely to be remade upon receipt and sometimes remade directly from the barcode. This means the new ballot is not even a voter-verified paper record but an electronically remade version thereof, which may or may not undergo sufficient scrutiny to qualify as a record of voter intent, regardless of how "clearly marked" it may be.

- 12) Related Legislation: AB 1805 (Huffman) which passed out of this committee on March 27, 2012, establishes new voting procedures for military and overseas voters, as defined, to comply with the UOCAVA and implement the policies of that act and the Uniform Military & Overseas Voter Act adopted by the National Conference of Commissioners on Uniform State laws. Among other provisions, AB 1805 expands the universe of people who can be considered military or overseas voters; expands the use of the Federal Write-In Absentee Ballot by allowing it to be used by military or overseas voters in non-federal elections; and makes other conforming changes, where appropriate in California, to ensure continuity and uniformity across state lines for military and overseas voters. AB 1805 is pending in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Council of the Blind
Disabled American Veterans, Department of California

Opposition

Disability Rights California
Secretary of State Debra Bowen (unless amended)
Service Employees International Union
Verified Voting

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