

Assembly Bill No. 1929

CHAPTER 694

An act to amend Sections 362, 19100, and 19103 of, to add Section 303.3 to, and to add Chapter 3.5 (commencing with Section 19260) to Division 19 of, the Elections Code, relating to elections, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 28, 2012. Filed with Secretary of State September 28, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1929, Gorell. Elections: casting ballots.

Existing law provides for the conduct of elections generally. Existing law prohibits the use of a voting system for an election unless it has been approved as meeting specified criteria by the Secretary of State prior to the election. Existing law 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.

This bill would exempt from the definition of a "voting system" a ballot marking system. The bill would define a ballot marking system to mean a mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking a ballot for a special absentee voter and that is not connected to a voting system at any time.

The bill would require the Secretary of State to study and adopt regulations governing the use of ballot marking systems. The bill would establish procedures to govern the approval of ballot marking systems by the Secretary of State. The bill would prohibit the use of a ballot marking system at an election until it has been approved by the Secretary of State as meeting prescribed criteria.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 303.3 is added to the Elections Code, to read:

303.3. "Ballot marking system" means any mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking a ballot for a special absentee voter and is not connected to a voting system at any time.

SEC. 2. Section 362 of the Elections Code is amended to read:

362. "Voting system" means a mechanical, electromechanical, or electronic system and its software, or any combination of these used for

casting a ballot, tabulating votes, or both. “Voting system” does not include a ballot marking system.

SEC. 3. Section 19100 of the Elections Code is amended to read:

19100. The Secretary of State shall study and adopt regulations governing the use of voting machines, voting devices, vote tabulating devices, and ballot marking systems.

SEC. 4. Section 19103 of the Elections Code is amended to read:

19103. (a) (1) No later than 10 business days after the Secretary of State approves the use of a new or updated voting system, the vendor of the voting system shall cause an exact copy of the approved source code for each component of the voting system, including complete build and configuration instructions and related documents for compiling the source code into object code, to be transferred directly from the United States Election Assistance Commission or the voting system testing laboratory, which evaluated the voting system and is accredited by the United States Election Assistance Commission, and deposited into an approved escrow facility.

(2) No later than 10 business days after the Secretary of State approves the use of a new or updated ballot marking system, the vendor of the ballot marking system shall cause an exact copy of the approved source code for each component of the ballot marking system, including complete build and configuration instructions and related documents for compiling the source code into object code, to be deposited into an approved escrow facility.

(b) The Secretary of State shall adopt regulations relating to all of the following:

(1) The definition of source code components of a voting system or ballot marking system, including source code for all firmware and software of the voting system or ballot marking system. Firmware and software shall include commercial off-the-shelf or other third-party firmware and software that is available and able to be disclosed by the vendor of the voting system or ballot marking system.

(2) Specifications for the escrow facility, including security and environmental specifications necessary for the preservation of the voting system or ballot marking system source codes.

(3) Procedures for submitting voting system or ballot marking system source codes.

(4) Criteria for access to voting system or ballot marking system source codes.

(5) Requirements for the vendor to include in the materials deposited in escrow build and configuration instructions and documents so that a neutral third party may create, from the source codes in escrow, executable object codes identical to the code installed on approved voting systems or ballot marking systems.

(c) The Secretary of State shall have reasonable access to the materials placed in escrow, under the following circumstances:

(1) In the course of an investigation or prosecution regarding vote counting or ballot marking equipment or procedures.

(2) Upon a finding by the Secretary of State that an escrow facility or escrow company is unable or unwilling to maintain materials in escrow in compliance with this section.

(3) In order to fulfill the provisions of this chapter related to the examination and approval of voting systems or ballot marking systems.

(4) In order to verify that the software on a voting system, voting machine, vote tabulating device, or ballot marking system is identical to the approved version.

(5) For any other purpose deemed necessary to fulfill the provisions of this code or Section 12172.5 of the Government Code.

(d) The Secretary of State may seek injunctive relief requiring the elections officials, approved escrow facility, or any vendor or manufacturer of a voting machine, voting system, vote tabulating device, or ballot marking system to comply with this section and related regulations. Venue for a proceeding under this section shall be exclusively in Sacramento County.

(e) This section applies to all elections.

SEC. 5. Chapter 3.5 (commencing with Section 19260) is added to Division 19 of the Elections Code, to read:

CHAPTER 3.5. APPROVAL OF BALLOT MARKING SYSTEMS

19260. The Secretary of State shall not approve any ballot marking system, or part of a ballot marking system, unless it fulfills the requirements of this code and the regulations of the Secretary of State.

19261. (a) A ballot marking system, in whole or in part, shall not be used unless it has received the approval of the Secretary of State prior to the election at which it is to be first used.

(b) A jurisdiction shall not purchase or contract for a ballot marking system, in whole or in part, unless it has received the approval of the Secretary of State.

19262. (a) A person or corporation owning or having an interest in a ballot marking system or a part of a ballot marking system may apply to the Secretary of State to examine it and report on its accuracy and efficiency to fulfill its purpose. As part of its application, the vendor of a ballot marking system or a part of a ballot marking system shall notify the Secretary of State in writing of any known defect, fault, or failure of the version of the hardware, software, or firmware of the ballot marking system or a part of the ballot marking system submitted. The Secretary of State shall not begin his or her examination until he or she receives a completed application from the vendor of the ballot marking system or a part of the ballot marking system. The vendor shall also notify the Secretary of State in writing of any defect, fault, or failure of the version of the hardware, software, or firmware of the ballot marking system or a part of the ballot marking system submitted that is discovered after the application is submitted and before the Secretary of State submits the report required by Section 19267. The Secretary of State shall complete his or her examination without undue delay.

(b) After receiving a vendor's written notification of a defect, fault, or failure, the Secretary of State shall notify the United States Election Assistance Commission or its successor entity of the problem as soon as practicable so as to present a reasonably complete description of the problem. The Secretary of State shall subsequently submit a report regarding the problem to the United States Election Assistance Commission or its successor entity. The report shall include any report regarding the problem submitted to the Secretary of State by the vendor.

(c) The following definitions apply for purposes of this chapter:

(1) "Defect" means 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.

(2) "Failure" means 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.

(3) "Fault" means 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.

19263. The Secretary of State may make all arrangements for the time and place to examine ballot marking systems proposed to be sold in this state. He or she shall furnish a complete report of the findings of the examining engineers to the Governor and the Attorney General.

19264. (a) Prior to giving his or her decision approving or withholding approval of any ballot marking system, the Secretary of State shall hold a public hearing to give interested persons an opportunity to express their views for or against the system.

(b) The Secretary of State shall give notice of the hearing in the manner prescribed in Section 6064 of the Government Code in a newspaper of general circulation published in Sacramento County. The Secretary of State shall also transmit written notice of the hearing, at least 30 days prior to the hearing, to each county elections official, to any person that the Secretary of State believes will be interested in the hearing, and to any person who requests, in writing, notice of the hearing.

(c) The decision of the Secretary of State, either approving or withholding approval of a ballot marking system, shall be in writing and shall state the findings of the Secretary of State. The decision shall be open to public inspection.

19265. The Secretary of State shall establish the specifications for and the regulations governing ballot marking systems, and the related software. The criteria for establishing the specifications and regulations shall include, but not be limited to, the following:

(a) The system and its software shall be suitable for the purpose for which it is intended.

(b) The system shall preserve the secrecy of the ballot.

(c) The system shall be safe from fraud or manipulation.

19266. For the purpose of assistance in examining a ballot marking system, the Secretary of State may employ not more than three expert electronic technicians at a cost to be set by the Secretary of State. The compensation of the electronic technicians shall be paid by the person or corporation submitting the ballot marking system.

The Secretary of State may require the person or corporation submitting the ballot marking system to deposit sufficient funds to guarantee the payment of the examination charges. The Secretary of State may deposit the funds in an appropriate treasury trust account and, within 30 days after his or her report of examination, draw a refund check to the credit of the person or corporation for any amount in excess of costs.

19267. Within 30 days after completing the examination of any ballot marking system, the Secretary of State shall place on file a report stating whether, in his or her opinion, the kind of ballot marking system examined can safely be used. The report shall also contain a written or printed description and drawings and photographs clearly identifying the system and its operation.

19268. If the report states that the ballot marking system can be used, it shall be deemed approved by the Secretary of State and systems of its kind may be adopted for use at elections.

19269. Within 10 days after filing the report, the Secretary of State shall send a copy to the board of supervisors of each county.

19270. (a) When a ballot marking system has been approved by the Secretary of State, the vendor shall notify the Secretary of State 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 a part of the system within 30 calendar days after the vendor learns of the defect, fault, or failure.

(b) After receiving a vendor's written notification of a defect, fault, or failure pursuant to subdivision (a), the Secretary of State shall notify the United States Election Assistance Commission or its successor entity of the problem as soon as practicable so as to present a reasonably complete description of the problem. The Secretary of State shall subsequently submit a report regarding the problem to the United States Election Assistance Commission or its successor entity. The report shall include any report regarding the problem submitted to the Secretary of State by the vendor.

19271. When a ballot marking system has been approved by the Secretary of State, it shall not be changed or modified until the Secretary of State has been notified in writing and has determined that the change or modification does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval pursuant to this chapter. The Secretary of State may 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.

19272. The Secretary of State may seek injunctive and administrative relief when a ballot marking system has been compromised by the addition or deletion of 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 pursuant to Section 19270.

19273. (a) The Secretary of State may seek all of the following relief for an unauthorized change in hardware, software, or firmware in a ballot marking system approved or conditionally approved in California:

(1) A civil penalty from the offending party or parties, not to exceed ten thousand dollars (\$10,000) per violation. For purposes of this subdivision, each ballot marking system component found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation. A penalty imposed pursuant to this subdivision shall be apportioned 50 percent to the county in which the violation occurred, if applicable, and 50 percent to the Office of the Secretary of State for purposes of bolstering ballot marking system security efforts.

(2) Immediate commencement of proceedings to withdraw approval for the ballot marking system in question.

(3) Prohibiting the manufacturer or vendor of a ballot marking system from doing elections-related business in the state for one, two, or three years.

(4) 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.

(5) Any other remedial actions authorized by law to prevent unjust enrichment of the offending party.

(b) (1) The Secretary of State may 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. For purposes of this subdivision, each defect, fault, or failure shall be considered a separate violation. 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.

(C) In addition to any other penalties or remedies established by this section, the offending party or parties shall be liable in the amount of one thousand dollars (\$1,000) per day after the applicable deadline established in Section 19270 until the required disclosure is filed with the Secretary of State.

(2) A penalty imposed pursuant to subparagraph (B) or (C) of paragraph (1) shall be deposited in the General Fund.

(c) Prior to seeking any measure of relief under this section, the Secretary of State shall hold a public hearing. The Secretary of State shall give notice of the hearing in the manner prescribed by Section 6064 of the Government

Code in a newspaper of general circulation published in Sacramento County. The Secretary of State also shall transmit written notice of the hearing, at least 30 days prior to the hearing, to each county elections official, the offending party or parties, any persons that the Secretary of State believes will be interested in the hearing, and any persons who request, in writing, notice of the hearing.

(d) The decision of the Secretary of State, to seek relief under this section, shall be in writing and state his or her findings. The decision shall be open to public inspection.

19274. (a) The Secretary of State may seek injunctive relief requiring an elections official, or any vendor or manufacturer of a ballot marking system, to comply with the requirements of this code, the regulations of the Secretary of State, and the specifications for the ballot marking system, and its software, including the programs and procedures for vote marking and testing.

(b) Venue for a proceeding under this section shall be exclusively in Sacramento County.

19275. A ballot marking system or part of a ballot marking system shall not do any of the following:

(a) Have the capability, including an optional capability, to use a remote server to mark a voter's selections transmitted to the server from the voter's computer via the Internet.

(b) Have the capability, including an optional capability, to store any voter identifiable selections on any remote server.

(c) Have the capability, including the optional capability, to tabulate votes.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to avoid delays, prior to the upcoming statewide general election, that are caused by current voting systems that disenfranchise overseas voters and United States military personnel serving overseas by preventing ballots from being returned to elections officials in time to be counted, it is necessary that this act take effect immediately.