



SHIRLEY N. WEBER, PH.D.
CALIFORNIA SECRETARY OF STATE

November 12, 2021

David J. Canepa
President, Board of Supervisors
County of San Mateo
Hall of Justice - 400 County Center
Redwood City, CA 94063

Shamann Walton
President, Board of Supervisors
City & County of San Francisco
City Hall - 1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, Ca. 94102-4689

Dear President Canepa and President Walton,

Thank you for your August 11, 2021 correspondence. In your correspondence, you request that the California Secretary of State adopt regulations pertaining to voting system pilot programs. It is our understanding that both of you want to utilize a voting system that is not certified or conditionally approved in California, but that is an open-source voting system, for your respective counties in a pilot program during the November 8, 2022, General Election. Thank you for your proposed text and other supporting information. You have also requested that the Secretary of State file the regulations on an emergency basis with the California Office of Administrative Law.

Secretary of State staff has met with members of your respective teams on July 15, 2021, and October 6, 2021 to discuss the current statutory requirements and possible pilot projects for an open-source voting system.

Request for Regulations

It is the expressed intent of the Secretary of State to move forward with promulgating regulations regarding the use of open-source voting systems in pilot programs. Preliminary activities relating to drafting proposed regulations are underway. The regulations to be developed may include, but not be limited to, requirements for plans, implementation and use requirements, and testing and review requirements.

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The Rulemaking Process Under the Administrative Procedure Act

The state rulemaking process begins with the research and gathering of necessary materials and information to develop the following four documents required to initiate the formal Administrative Procedure Act (APA) (Chapter 3.5 of the California Government Code, section 11340 et seq.) rulemaking process with the Office of administrative Law, the agency responsible for reviewing and approving state regulations: (a) Express Terms (Proposed Regulations), (b) Notice of Proposed Action, (c) Initial Statement of Reasons, and (e) Economic and Fiscal Impact Statement. The Secretary of State has historically included parties from outside of the agency, typically those who would be subject to the proposed regulations, to participate in this process.

Upon initiation of the rulemaking process, the Secretary of State is required to also publish a notice of proposed action to the California Regulatory Notice Register and provide notice to all persons that have requested notice. Once the APA rulemaking process is officially started, the Secretary of State has one year to complete process and submit the completed rulemaking file to OAL.

The APA requires a minimum 45-day period for the public to comment to the agency in writing on the proposed regulation. The Secretary of State has historically held public hearings for proposed rulemaking actions. Hearings must be scheduled for a date at least 45 days after the notice of proposed action was published. At the public hearing, both written and oral comments are accepted.

After the initial public comment period, any changes made to the initial proposal require further notice to the public and must be made available for public comment for at least 15 days. If a change is substantial and not sufficiently related to the original proposal, the Secretary of State is required to publish another 45-day notice in the California Regulatory Notice Register. In both instances, a notice of opportunity to comment on proposed changes along with a copy of the text of the proposed changes must be sent to each person who has submitted written comments on the proposal, testified at the public hearing, or asked to receive any notices of proposed modification. However, no further public hearing is required. This typically transpires several times prior to the adoption of regulations.

The Secretary of State is required to summarize and respond to comments that are directed at the proposal or at the procedures of the rulemaking action. For each comment, the Secretary of State must include either an explanation of how the proposed action has been changed to accommodate the comment or state the reasons for rejecting the comment. In summarizing and responding to public comments, the agency must demonstrate that it understood and considered the comment. The summary and response to comments is included as part of the rulemaking file in a document called a Final Statement of Reasons. This is also an extensive process that can require a considerable amount of time and resources depending on the quantity of the received comments.

Once submitted, OAL has 30 working days to conduct a review of the rulemaking record to ensure that the agency satisfied the requirements of the APA and Office of Administrative Law's regulations. OAL will then either approve the rulemaking action and file the proposed regulation with the Secretary of State or disapprove the rulemaking action. Regulations typically become effective on quarterly dates based on when the final regulations are filed with the Secretary of State. The typical quarterly effective dates are January 1, April 1, July 1, and October 1.

Request to File Regulations as an Emergency

After analysis, the request to file voting system pilot program regulations on an emergency basis to allow utilization of a piloted uncertified voting system for the November 8, 2022, General Election does not meet the requirements outlined in the California Government Code. Government Code section 11342.545 provides that an emergency means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. For an emergency regulation to be approved, an emergency must be shown to exist. Unless a situation is expressly deemed in statute to meet the emergency standard, an agency must make a finding of emergency by describing specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. Additionally, pursuant Government Code section 11346.1(b)(2), a finding of emergency based only upon expediency, convenience, best interest, public need, or speculation, is not adequate to demonstrate the existence of an emergency.

Next Steps

As indicated above, the Secretary of State has begun the preliminary activities for drafting and promulgating regulations. We look forward to your participation in the rulemaking process.

As you are aware, the California Elections Code allows that a governing board can provide for the experimental use of a voting system in a pilot program in an election if the voting system is either: (1) certified or conditionally approved prior to its experimental use; or (2) uses only software and firmware with disclosed source, implements risk-limiting auditing, is suitable for the purpose for which it is intended, preserves the secrecy of the ballot, is safe from fraud or manipulation, is accessible to voters with disabilities pursuant to Elections Code section 19242 and applicable federal laws, and is accessible to voters who require assistance in a language other than English if the language is one in which a ballot or ballot materials are required to be made available to voters pursuant to Elections Code section 14201 and applicable federal laws.

Accordingly, you have two paths forward: submit the voting system for testing and review for certification pursuant to California Elections Code and the California Code of Regulations or utilize a system that is solely disclosed source. If you chose to submit the voting system for testing and review for certification, the application and associated information can be found on our website: <https://votingsystems.cdn.sos.ca.gov/cert-and-approval/vsysapproval/vote-tech-applic-2021.pdf>. If you chose to pursue a system that is solely disclosed source, as the regulation

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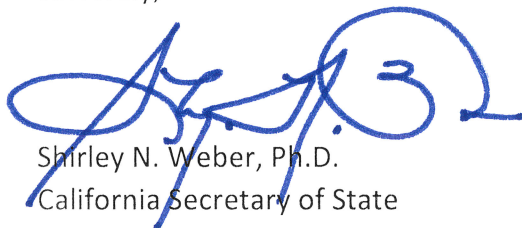
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process moves forward, the Secretary of State would encourage you to clearly outline and document each of your jurisdiction's intended voting system equipment, implementation and use and provide it to our office for feedback. The outline and documentation should provide, at minimum, (a) a list of each piece of hardware, software and firmware that will be used and how each complies with the requirements in (2) above; and (b) draft Use Procedures on how the system will be implemented and used by county election officials and poll workers. The Use Procedures should be written to conform to the template that is available from the Secretary of State's website at:

<http://votingsystems.cdn.sos.ca.gov/cert-and-approval/vsysapproval/useprocedures-2006.pdf>.

Again, thank you for your correspondence and partnership on this issue. We look forward to working with you.

Sincerely,



Shirley N. Weber, Ph.D.
California Secretary of State