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AGENDA

Committee on Legal Services

April 20, 2016

7:30 a.m.

HCR 0112

1. Review of New Rules (rules adopted or amended on or after November 1, 2015, and before November 1, 2016, and scheduled to expire May 15, 2017):
 - a. Rule 11.9 of the Secretary of State, Department of State, concerning purchases and contracts of electromechanical or electronic voting system, devices, or related components, 8 CCR 1505-1 (LLS Docket No. 160146; SOS Tracking No. 2015-00846).
Staff: Kate Meyer, Senior Attorney
(Status: Uncontested)
2. Approval of HB 16-1257 by Representative McCann; also Senator Scheffel - Rule Review Bill.
3. Upcoming Meetings During the Session:
The Committee will meet April 29 upon adjournment of both houses to sit as the Committee of Reference in the Senate on HB 16-1257.
4. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Kate Meyer, Office of Legislative Legal Services

DATE: March 24, 2016

SUBJECT: Rule 11.9 of the Secretary of State, Department of State, concerning Purchases and Contracts, 8 CCR 1505-1 (LLS Docket No.160146; SOS Tracking No. 2015-00846).¹

Summary of Recommendation

On February 9, 2016, the Secretary of State ("Secretary") adopted various elections rules, including Rule 11.9² concerning Purchases and Contracts. Although Rule 11.9 is not scheduled to expire until May 15, 2017, the House of Representatives recently rereferred the 2016 "Rule Review Bill", House Bill 16-1257, back to the Committee on Legal Services ("Committee") in order to consider this rule.

The Office has reviewed the rule and has concluded that Rule 11.9 is within the Secretary's rulemaking authority. Because nothing in the rule conflicts with statute or

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rulemaking authority. Under § 24-4-103 (8) (c) (I), C.R.S., these rules are not scheduled to expire until May 15, 2017, but the House of Representatives voted on March 16, 2016, to rerefer the bill back to the Committee on Legal Services so that the Office of Legislative Legal Services and the Committee could review Rule 11.9 during the current regular session of the General Assembly.

² The final ["clean"] version of Rule 11.9 is attached to this memorandum as **Addendum A**.

exceeds the Secretary's rulemaking authority, **we therefore recommend that the Committee take no action regarding Rule 11.9.**

Rulemaking Authority

Section 1-1-107 (2) (a), C.R.S., generally authorizes the Secretary to adopt rules to administer and enforce election laws:

1-1-107. Powers and duties of secretary of state - penalty. (2) In addition to any other powers prescribed by law, the secretary of state shall have the following powers:

(a) To promulgate, publish, and distribute, either in conjunction with copies of the election laws pursuant to section 1-1-108 or separately, such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws, including but not limited to rules establishing the amount of fees as provided in this code;

With specific regard to electronic voting systems³ and electromechanical voting systems⁴ (collectively, "voting systems"), part 6 of article 5 of title 1, C.R.S.⁵, describes the processes and requirements for the acquisition and use of such voting systems by political subdivisions. Section 1-5-613 (1), C.R.S., directs the Secretary to promulgate rules regarding voting equipment, a term that includes electronic and electromechanical voting systems:⁶

³ As used in the "Uniform Election Code of 1992", articles 1 to 13 of title 1, C.R.S., an "'electronic voting system' means a system in which an elector votes using an electronic voting device." § 1-1-104 (15.5), C.R.S. The term "electronic voting device" is defined as "a device by which votes are recorded electronically, including a touchscreen system." § 1-1-104 (14.5), C.R.S.

⁴ An "'electromechanical voting system' means a system in which an elector votes using a device for marking a ballot card using ink or another visible substance and the votes are counted with electronic vote-tabulating equipment. The term includes a system in which votes are recorded electronically within the equipment on paper tape and are recorded simultaneously on an electronic device that permits tabulation at a counting center. As used in part 6 of article 5 of [title 1 of the Colorado Revised Statutes], 'electromechanical voting system' shall include a paper-based voting system." § 1-1-104 (13.5), C.R.S.

⁵ The entirety of part 6 of article 5 of title 1, C.R.S., is reproduced as **Addendum B**.

⁶ "'Voting equipment' means electronic or electromechanical voting systems, electronic voting devices, and electronic vote-tabulating equipment, as well as materials, parts, or other equipment necessary for the operation and maintenance of such systems, devices, and equipment." § 1-1-104 (50.7), C.R.S.

1-5-613. Purchase and sale of voting equipment. (1) The secretary of state shall adopt uniform rules in accordance with article 4 of title 24, C.R.S., for the purchase and sale of voting equipment in the state.

Analysis

The Secretary has broad rulemaking authority regarding the purchase and sale of voting systems.

Colorado law explicitly authorizes the use of voting systems to record, count, and tabulate votes in all elections.⁷ Part 6 of article 5 of title 1, C.R.S., describes the process by which voting systems may be acquired and the respective functions and duties of political subdivisions and the Secretary.

Political subdivisions, in consultation with their designated election officials, may adopt a voting system for use in elections, provided that any such voting systems are certified by the Secretary prior to such use.

1-5-612. Use of electronic and electromechanical voting systems.

(1) The governing body of any political subdivision may, upon consultation with the designated election official, adopt an electronic or electromechanical voting system, including any upgrade in hardware, firmware, or software, for use at the polling locations in the political subdivision. The system may be used for recording, counting, and tabulating votes at all elections held by the political subdivision.

(2) An electronic or electromechanical voting system may be used only if the system has been certified by the secretary of state in accordance with this part 6.⁸

Voting systems must satisfy the requirements of part 6 of article 5 of title 1, C.R.S., to be certified. Before acquiring and deploying a certified voting system, a political subdivision must obtain approval to do so from the Secretary.

1-5-617. Examination - testing - certification. (5) The designated election official of a political subdivision that plans to use an electronic or electro-

⁷ § 1-5-601 (1), C.R.S.

⁸ See also § 1-5-613 (2), C.R.S. ("On and after May 28, 2004, the governing body or designated election official of a political subdivision may purchase a voting system only if the voting system has been certified for use in this state by the secretary of state in accordance with this part 6.")

mechanical voting system that has been certified in accordance with this section shall apply to the secretary of state for approval of the purchase, installation, and use of the system. The secretary of state shall prescribe the form and procedure of the application by rule adopted in accordance with article 4 of title 24, C.R.S.

The Secretary is specifically directed to promulgate rules regarding the purchase and sale of voting systems in the state.

1-5-613. Purchase and sale of voting equipment. (1) The secretary of state shall adopt uniform rules in accordance with article 4 of title 24, C.R.S., for the purchase and sale of voting equipment in the state.

The Secretary's rulemaking authority with respect to approval of applications for purchase, then, is very broad. Pursuant to that broad grant of authority, Rule 11.9 makes comprehensive provision for potential voting systems transactions. Specifically, it restates the statutory approval prerequisite, specifies the circumstances under which applications for purchase or use of previously certified voting systems will be approved, lists the factors that the Secretary considers when considering an application for purchase of voting systems, describes requisite features that voting systems and licensing agreements must possess, requires contracts for purchase or lease to contain training and preventative maintenance provisions, limits approval to voting systems that allow for elections to be conducted in accordance with state law, and sets forth the list of voting systems and related components in use in Colorado. While Rule 11.9 is prescriptive, nothing in the rule conflicts with statute or exceeds the Secretary's rulemaking authority and is therefore within the Secretary's rulemaking authority.

Conclusion

The Secretary has broad authority to promulgate rules regarding the purchase and sale of voting equipment, including electronic and electromechanical voting systems. The Office therefore recommends that the Committee take no action on Rule 11.9 of the rules of the Secretary of State concerning Purchases and Contracts.

ADDENDUM A
COLORADO SECRETARY OF STATE
8 CCR 1505-1
Election Rules
Rules as Adopted – Clean⁹
February 9, 2016

11.9 Purchases and Contracts

11.9.1 In accordance with sections 1-5-617(5) and 1-5-623(3), C.R.S., a political subdivision may not purchase, lease, transfer, or use a certified electromechanical or electronic voting system, device, or related component, unless the political subdivision first applies for and obtains approval from the Secretary of State.

11.9.2 In the case of electromechanical or electronic voting systems, devices, or related components certified for use in Colorado before January 1, 2016, the Secretary of State will approve a political subdivision's application to purchase, lease, or use the voting system, device, or related component, only if:

- (a) The political subdivision purchased, leased or used the same voting system, device, or related component, before January 1, 2016; and
- (b) The political subdivision's application for approval is limited to the acquisition or use of voting system applications, components or voting devices intended to replace the same or substantially similar applications, devices and components that are damaged, defective or inoperable; and
- (c) Approval of the application, and the political subdivision's purchase, lease or use of the voting system components or voting devices, will not materially impair the political subdivision's future fiscal ability to purchase or lease a voting system certified for use in Colorado on or after January 1, 2016.

11.9.3 In the case of electromechanical or electronic voting systems, devices or related components certified for use in Colorado on or after January 1, 2016, the Secretary of State will approve a political subdivision's application to

⁹ The "clean" version displays the final rule (as opposed to the "redline" version, which shows the changes made to the rule using strikethrough and small capital lettering).

purchase, lease, or use the voting system, device, or related component, after considering all relevant factors, including without limitation:

- (a) Evaluations of the voting system performed by public committees organized by the secretary of state, and any recommendations regarding the use of the voting system by any such public committee;
- (b) The voting system's ability to support the efficient and uniform conduct of elections under the uniform election code of 1992, as amended;
- (c) The voting system's utilization of commercial off-the-shelf hardware components, rather than proprietary, purpose-built hardware components;
- (d) The voting system's integration of its data management application, if any, with other components of its election management system, so that system users can operate or access all election management system components within a single interface on the same server or workstation;
- (e) The voting system's ability to support efficient risk-limiting audits, or the commitment of the voting system provider to develop such capability, in time for the 2017 coordinated election, as required by section 1-7-515.5, C.R.S.;
- (f) The voting system's compatibility, or the voting system provider's commitment to develop such compatibility on or before December 31, 2016, with dependent systems that are not directly related to the tabulation of votes and ballots, but are nevertheless utilized by designated election officials in conducting elections in Colorado, including:
 - (1) Ballot-on-demand systems,
 - (2) Election Night Reporting systems,
 - (3) Electronic ballot delivery systems, and
 - (4) Election definition data exported from SCORE;
- (g) The voting system's ability to efficiently support elections principally conducted by mail ballot, in all political subdivisions, regardless of their size, number of registered electors, or fiscal resources, including:

- (1) The voting system's inclusion of applications enabling election judges to digitally, rather than manually, adjudicate, resolve, and duplicate ballots with marginal or ambiguous voter markings, and
 - (2) The voting system's use of ballot scanners equipped with automatic document feeders, enabling election judges to scan multiple ballots rather than a single ballot at a time;
- (h) The voting system's ability to enable voters with disabilities to vote independently and privately, and on the same or substantially similar devices throughout Colorado, without regard to their county of residence;
 - (i) The voting system's scalability and affordability, enabling all political subdivisions to utilize the same or substantially similar equipment, regardless of their size, number of registered voters, or fiscal resources;
 - (j) The voting system's portability as provided in the provider's hardware and software license agreements, enabling political subdivisions that purchase, lease, or use the system to loan or borrow voting devices and related components to or from one another without charge, as exigencies and other circumstances warrant, and as approved by the Secretary of State;
 - (k) The voting system's ability to easily export images of voted ballots, in response to requests filed under section 24-72-205.5(3)-(4), C.R.S., of the Colorado Open Records Act;
 - (l) The voting system provider's past performance of successfully implementing its voting system in multiple jurisdictions simultaneously;
 - (m) The voting system provider's past performance of successfully training local election officials to use its voting system in multiple jurisdictions simultaneously;
 - (n) The voting system provider's past performance of post-implementation customer and technical support for political subdivisions that acquire its voting system;
 - (o) The voting system provider's past performance of compliance with Colorado law regarding voter anonymity, and responsiveness to other issues and concerns raised by designated election officials and Secretary of State staff members;

- (p) The voting system provider's financial stability and sustainability as an ongoing business concern; and
- (q) The extent to which the voting system provider's hardware and software license agreements permit the Secretary of State, or political subdivisions that license the hardware and software applications necessary to program elections and voting devices, to perform those services without charge for other political subdivisions that are licensed to use the voting system.

11.9.4 The Secretary of State will approve a county's application for the purchase, lease, or use of an electromechanical or electronic voting system, device, or related component, certified on or after January 1, 2016, only if:

- (a) The voting system includes, and the county acquires, digital ballot resolution and adjudication capability;
- (b) The voting system includes, and the county acquires, central count ballot scanners equipped with automatic document feeders capable of scanning multiple ballots rather than a single ballot at a time;
- (c) The voting system integrates all components of the election management system, including the data management application, if any, into a single user interface that is operable or accessible from the same server or workstation;
- (d) The voting system is capable of supporting efficient risk-limiting audits, or the commitment of the voting system provider to develop such capability, on or before December 31, 2016, in the manner required by Rule 21.4.14;
- (e) The voting system is compatible, or the voting system provider commits to develop such compatibility on or before December 31, 2016, with dependent systems that are not directly related to the tabulation of votes and ballots, but are nevertheless utilized by designated election officials in conducting elections in Colorado, including:
 - (1) Ballot-on-demand systems,
 - (2) Election Night Reporting systems,
 - (3) Electronic ballot delivery systems, and
 - (4) Election definition data exported from SCORE;;

- (f) The voting system provider's software and hardware license agreements expressly permit political subdivisions that purchase, lease, or use the system to loan or borrow voting devices and related components to or from one another, without charge, as exigencies and other circumstances warrant, and as approved by the Secretary of State; and
- (h) The voting system provider's software and hardware license agreements expressly permit the Secretary of State, or political subdivisions that license the hardware and software applications necessary to program elections and voting devices, to perform those services without charge for other political subdivisions that are licensed to use the voting system.

11.9.5 Due to their unsuitability for risk-limiting audits, the Secretary of State will not approve a county's application to purchase, lease or use a ballot scanner certified for use on or after January 1, 2016, that is not equipped with an automatic document feeder, whether intended for use by voters at polling locations, or by election judges at central count locations.

11.9.6 A political subdivision's contract to purchase or lease a voting system under Rule 11.9.1 must provide for user training and preventative maintenance.

11.9.7 The Secretary of State will only approve a political subdivision's application to purchase or lease a voting system or component if the voting system or component allows the designated election official to conduct elections in accordance with Colorado law, as amended.

11.9.8 The Secretary of State will maintain a list of all certified electromechanical or electronic voting systems, devices and related components, purchased, leased, or used by Colorado political subdivisions. The list will include, at minimum, the name of the jurisdiction, the name and version of the voting system, the date of acquisition, and the serial number(s) of voting devices.

ADDENDUM B

COLORADO REVISED STATUTES TITLE 1, ARTICLE 5

PART 6

AUTHORIZATION AND USE OF VOTING MACHINES AND ELECTRONIC VOTING SYSTEMS

1-5-601. Use of voting systems - definition. (1) In all elections held in this state, the votes may be cast, registered, recorded, and counted by means of an electronic or electro-mechanical voting system as provided in this part 6.

(2) As used in this part 6, "electromechanical voting system" shall include a paper-based voting system as defined in section 1-1-104 (23.5).

1-5-601.5. Compliance with federal requirements. All voting systems and voting equipment offered for sale on or after May 28, 2004, shall meet the voting systems standards that were promulgated in 2002 by the federal election commission. At his or her discretion, the secretary of state may require by rule that voting systems and voting equipment satisfy voting systems standards promulgated after January 1, 2008, by the federal election assistance commission as long as such standards meet or exceed those promulgated in 2002 by the federal election commission. Subject to section 1-5-608.2, nothing in this section shall be construed to require any political subdivision to replace a voting system that is in use prior to May 28, 2004.

1-5-602. Requirements for voting machines - repeal. (Repealed)

1-5-603. Adoption and payment for voting machines. The governing body of any political subdivision may adopt for use at elections any kind of voting machine fulfilling the requirements for voting machines set forth in this part 6. These voting machines may be used at any or all elections held in the political subdivision for casting, registering, and counting votes. The governing body of any political subdivision which adopts and purchases or leases voting machines shall provide for the payment of the purchase price or the rent in such manner as may be in the best interest of the political subdivision and may for that purpose provide for the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon the county. The bonds, certificates of indebtedness, or other obligations may be made payable at such times, not exceeding ten years from the date of issue, as may be determined by the governing body but shall not be issued or sold at less than par.

1-5-604. Experimental use - repeal. (Repealed)

1-5-605. Other laws apply - paper ballots permitted for absentee voting - repeal. (Repealed)

1-5-605.5. Custody of voting system. The county clerk and recorder or designated election official shall be the custodian of the voting system in a political subdivision and may appoint deputies necessary to prepare and supervise the voting system prior to and during elections.

1-5-605.7. Mechanical lever voting machines - prohibited. (1) No voting system using mechanical lever voting machines may be used in any election in this state.
(2) Repealed.

1-5-606. Election officials and employees not to have interest in voting equipment or devices. No election official or employee of an election official having duties or responsibilities in connection with the conduct of any election shall have any financial or proprietary interest, either directly or indirectly, in the manufacture, sale, maintenance, servicing, repair, or transportation of voting equipment. This section shall not apply to any designated election official or employee of a designated election official participating in a coordinated election who has no independent decision-making responsibility concerning the selection of voting equipment by the county clerk and recorder or whose interest derives solely from ownership of shares in a mutual or pension fund.

1-5-607. Elected officials not to handle voting equipment or devices. (1) In any political subdivision having a population of one hundred thousand or more, it is unlawful for any elected official or candidate for elective office to prepare, maintain, or repair any voting equipment or device that is to be used or is used in any election. The provisions of this section shall be limited to actual physical contact with any voting equipment or device or any of its parts and shall not be construed as prohibiting an elected official from directing employees or other persons who are not elected officials to prepare, maintain, repair, or otherwise handle any voting equipment or devices.

(2) The provisions of this section shall not be construed to prohibit any elected official or candidate for elective office from voting at any election.

(3) The provisions of this section shall not apply to precinct committee persons who act as election judges.

(4) Repealed.

1-5-608. Requirements - electronic voting systems - repeal. (Repealed)

1-5-608.2. Punch card voting systems - prohibited. (1) No punch card electronic voting system or other voting system in which the elector uses a device to pierce the ballot may be used in any election in this state.

(2) Repealed.

1-5-608.5. Electronic and electromechanical voting systems - testing by federally accredited labs - certification and approval of purchasing of electronic and electromechanical voting systems by secretary of state - conditions of use by secretary of state -

testing. (1) A federally accredited laboratory may test, approve, and qualify electronic and electromechanical voting systems for sale and use in the state of Colorado.

(2) (Deleted by amendment, L. 2009, (HB 09-1335), ch. 260, p. 1190, § 4, effective May 15, 2009.)

(3) (a) If the electronic and electromechanical voting systems tested pursuant to this section satisfy the requirements of this part 6, the secretary of state shall certify such systems and approve the purchase, installation, and use of such systems by political subdivisions and establish standards for certification.

(b) The secretary of state may promulgate conditions of use in connection with the use by political subdivisions of electronic and electromechanical voting systems as may be appropriate to mitigate deficiencies identified in the certification process.

(c) In undertaking the certification required by this section, the secretary of state may consider either procedures used or adopted by county clerk and recorders or best practices recommended by equipment vendors.

(4) In undertaking the certification required by this section, the secretary of state may request a federally accredited laboratory to undertake the testing of an electronic or electromechanical voting system or may use and rely upon the testing of an electronic or electromechanical voting system already performed by another state or a federally accredited laboratory upon satisfaction of the following conditions:

(a) The secretary of state has complete access to any documentation, data, reports, or similar information on which the other state or laboratory relied in performing its testing and will make such information available to the public subject to any redaction required by law; and

(b) The secretary of state makes written findings and certifies that he or she reviewed the information specified in paragraph (a) of this subsection (4) and determines that the testing:

(I) Was conducted in accordance with appropriate engineering standards in use as of the time the testing is undertaken; and

(II) Satisfies the requirements of sections 1-5-615 and 1-5-616 and all rules promulgated thereunder.

(5) In undertaking the certification required by this section, the secretary of state may conduct joint testing with an agency of another state or with a federally accredited laboratory.

1-5-609. Acquisition and use authorized - repeal. (Repealed)

1-5-610. Preparation for use - electronic voting. (1) Prior to an election in which an electronic voting system is to be used, the designated election official shall have all system components prepared for voting and shall inspect and determine that each vote recorder or voting device is in proper working order. The designated election official shall cause a sufficient number of recorders or devices to be delivered to each election precinct in which an electronic voting system is to be used.

(2) The designated election official shall supply each election precinct in which vote recorders or voting devices are to be used with a sufficient number of ballots, ballot cards, sample ballots, ballot boxes, and write-in ballots and with such other supplies and forms as

may be required. Each ballot or ballot card shall have a serially numbered stub attached, which shall be removed by an election judge before the ballot or ballot card is deposited in the ballot box.

1-5-611. Requirements - nonpunch card electronic voting systems. (1) No non-punch card electronic voting system shall be purchased, leased, or used unless it fulfills the following requirements:

- (a) It provides for voting in secrecy;
- (b) It permits each elector to write in the names of eligible candidates not appearing on the printed ballot, to vote for as many candidates for an office as there are vacancies for which the elector is entitled to vote, and to vote for or against any ballot issue upon which the elector is entitled to vote;
- (c) It rejects any vote for an office or on a ballot issue if the number of votes exceeds the number the elector is entitled to cast;
- (d) It permits each elector, other than at a primary election, to vote for the candidates of one or more parties and for unaffiliated candidates;
- (e) It prevents the elector from voting for the same candidates more than once for the same office; and
- (f) If the system uses a voting device:
 - (I) It is suitably designed, of durable construction, and capable of being used safely, efficiently, and accurately in the conduct of elections and the tabulation of votes;
 - (II) It permits the names of candidates and the text of issues to be printed on pages which are securely attached to the voting device, the pages to be securely locked in a metal frame or sealed to prevent tampering;
 - (III) It contains a protective counter with a register which cannot be reset, which shall register the cumulative total number of movements of the operating mechanism; and
 - (IV) It is capable of providing printouts of vote totals by office and candidate or by ballot issue, including a numeric-only printout to be used for testing as provided in section 1-7-509.

1-5-612. Use of electronic and electromechanical voting systems. (1) The governing body of any political subdivision may, upon consultation with the designated election official, adopt an electronic or electromechanical voting system, including any upgrade in hardware, firmware, or software, for use at the polling locations in the political subdivision. The system may be used for recording, counting, and tabulating votes at all elections held by the political subdivision.

(2) An electronic or electromechanical voting system may be used only if the system has been certified by the secretary of state in accordance with this part 6.

1-5-613. Purchase and sale of voting equipment. (1) The secretary of state shall adopt uniform rules in accordance with article 4 of title 24, C.R.S., for the purchase and sale of voting equipment in the state.

(2) On and after May 28, 2004, the governing body or designated election official of a political subdivision may purchase a voting system only if the voting system has been certified for use in this state by the secretary of state in accordance with this part 6.

(3) The governing body or designated election official of a political subdivision shall notify the secretary of state before purchasing or selling voting equipment. The secretary of state shall attempt to coordinate the sale of excess or outmoded equipment by one political subdivision with purchases of necessary equipment by other political subdivisions.

(4) The secretary of state shall provide information at the request of the governing bodies of the various political subdivisions of the state on the availability and sources of new and used voting equipment.

1-5-614. Certification of electronic and electromechanical voting systems - standards. (Repealed)

1-5-615. Electronic and electromechanical voting systems - requirements. (1) The secretary of state shall not certify any electronic or electromechanical voting system unless such system:

- (a) Provides for voting in secrecy;
- (b) Permits each elector to vote for all offices for which the elector is lawfully entitled to vote and no others, to vote for as many candidates for an office as the elector is entitled to vote for, and to vote for or against any ballot question or ballot issue on which the elector is entitled to vote;
- (c) Permits each elector to verify his or her votes privately and independently before the ballot is cast;
- (d) Permits each elector privately and independently to change the ballot or correct any error before the ballot is cast, including by voting a replacement ballot if the elector is otherwise unable to change the ballot or correct an error;
- (e) If the elector overvotes:
 - (I) Notifies the elector before the ballot is cast that the elector has overvoted;
 - (II) Notifies the elector before the vote is cast that an overvote for any office, ballot question, or ballot issue will not be counted; and
 - (III) Gives the elector the opportunity to correct the ballot before the ballot is cast;
- (f) Does not record a vote for any office, ballot question, or ballot issue that is overvoted on a ballot cast by an elector;
- (g) For electronic and electromechanical voting systems using ballot cards, accepts an overvoted or undervoted ballot if the elector chooses to cast the ballot, but it does not record a vote for any office, ballot question, or ballot issue that has been overvoted;
- (h) In a primary election, permits each elector to vote only for a candidate seeking nomination by the political party with which the elector is affiliated;
- (i) In a presidential election, permits each elector to vote by a single operation for all presidential electors of a pair of candidates for president and vice president;
- (j) Does not use a device for the piercing of ballots by the elector;
- (k) Provides a method for write-in voting;
- (l) Counts votes correctly;
- (m) Can tabulate the total number of votes for each candidate for each office and the total number of votes for and against each ballot question and ballot issue for the polling location;

- (n) Can tabulate votes from ballots of different political parties at the same voter service and polling center in a primary election;
 - (o) Can automatically produce vote totals for the polling location in printed form; and
 - (p) Saves and produces the records necessary to audit the operation of the electronic or electromechanical voting system, including a permanent paper record with a manual audit capacity.
- (2) The permanent paper record produced by the electronic or electromechanical voting system shall be available as an official record for any recount conducted for any election in which the system was used.

1-5-616. Electronic and electromechanical voting systems - standards - procedures. (1) The secretary of state shall adopt rules in accordance with article 4 of title 24, C.R.S., that establish minimum standards for electronic and electromechanical voting systems regarding:

- (a) Functional requirements;
- (b) Performance levels;
- (c) Physical and design characteristics;
- (d) Documentation requirements;
- (e) Evaluation criteria;
- (f) Audit capacity;
- (g) Security requirements;
- (h) Telecommunications requirements; and
- (i) Accessibility.

(2) The secretary of state may review the rules adopted pursuant to subsection (1) of this section governing standards for certification of electronic or electromechanical voting systems to determine the adequacy and effectiveness of the rules in assuring that elections achieve the standards established by section 1-1-103.

(3) The secretary of state shall adopt rules in accordance with article 4 of title 24, C.R.S., to achieve the standards established by section 1-1-103 for the procedures of voting, including write-in voting, and of counting, tabulating, and recording votes by electronic or electromechanical voting systems used in this state.

(4) The secretary of state shall adapt the standards for certification of electronic or electromechanical voting systems established by rule pursuant to subsection (1) of this section to ensure that new technologies that meet the requirements for such systems are certified in a timely manner and available for selection by political subdivisions and meet user standards.

(5) (a) Each designated election official shall establish written procedures to ensure the accuracy and security of voting in the political subdivision and submit the procedures to the secretary of state for review. The secretary of state shall notify the designated election official of the approval or disapproval of the procedures no later than fifteen days after the secretary of state receives the submission.

(b) Each designated election official shall submit any revisions to the accuracy and security procedures to the secretary of state no less than sixty days before the first election in which the procedures will be used. The secretary of state shall notify the designated elec-

tion official of the approval or disapproval of said revisions no later than fifteen days after the secretary of state receives the submission.

1-5-617. Examination - testing - certification. (1) (a) After an electronic or electromechanical voting system is tested in accordance with section 1-5-608.5, the voting system provider may submit the system to the secretary of state for certification.

(b) The secretary of state shall examine each electronic or electromechanical voting system submitted for certification and determine whether the system complies with the requirements of section 1-5-615 and the standards established under section 1-5-616.

(c) The secretary of state shall decide whether to certify an electronic or electromechanical voting system within one hundred twenty days after the system is submitted for certification.

(2) The secretary of state shall appoint one or more experts in the fields of data processing, mechanical engineering, or public administration to assist in the examination and testing of electronic or electromechanical voting systems submitted for certification and to produce a written report on each system.

(3) Neither the secretary of state nor any examiner shall have any pecuniary interest in any voting equipment.

(4) Within thirty days after deciding to certify an electronic or electromechanical voting system, the secretary of state shall make a report on the system containing a description of the system and its operation, with drawings or photographs showing the system. The secretary of state shall send a notice of certification and a copy of the report to the voting system provider that submitted the system for certification. The secretary of state shall notify the governing bodies of the political subdivisions of the state of the certification and make the notice of certification and report available to them upon request.

(5) The designated election official of a political subdivision that plans to use an electronic or electromechanical voting system that has been certified in accordance with this section shall apply to the secretary of state for approval of the purchase, installation, and use of the system. The secretary of state shall prescribe the form and procedure of the application by rule adopted in accordance with article 4 of title 24, C.R.S.

(6) The secretary of state may provide technical assistance to designated election officials on issues related to the certification of the purchase, installation, and use of electronic and electromechanical voting systems by a political subdivision.

1-5-618. Modification of electronic and electromechanical voting systems - definition. (1) After an electronic or electromechanical voting system has been certified by the secretary of state, a political subdivision may not adopt any modification of the system until the modification is certified or approved in accordance with the provisions of subsection (1.5) of this section by the secretary of state. A person desiring approval of a modification shall submit a written application for approval to the secretary of state.

(1.5) Upon receipt of the written application for approval in accordance with subsection (1) of this section, the secretary of state shall undertake a preliminary examination of the proposed modification. In connection with such preliminary review, the secretary shall determine if the proposed modification may cause adverse effects on the security or accuracy of elections. The secretary shall make the determination within forty-five days after

receiving the request. If the secretary, upon completion of his or her preliminary review of the request, determines that the proposed modification will cause significant adverse effects, the modification shall be subject to further review under the provisions of subsection (2) of this section. If the secretary determines, upon completion of his or her preliminary review, that the proposed modification causes no adverse effects, the secretary shall approve the modification. If the secretary determines, upon completion of his or her preliminary review, that the proposed modification causes possible adverse effects, the modification shall be subject to further review under the provisions of subsection (4) of this section. Following such additional review, if the secretary determines that any adverse effects of the proposed modification are insignificant, the secretary shall approve the modification. If, however, following such additional review, the secretary determines that the adverse effects of the modification are significant, the modification shall be subject to further review under the provisions of subsection (2) of this section.

(2) The requirements for approval of a modified electronic or electromechanical voting system are the same as those prescribed by this part 6 for the initial certification of the system.

(3) The secretary of state shall approve the modified electronic or electromechanical voting system by written order if the modified system satisfies the applicable requirements for certification.

(4) If the secretary of state does not approve the modified design, the secretary of state shall by written order:

(a) Invite the applicant to submit additional information in support of the application, submit the modified electronic or electromechanical voting system itself, or both; or

(b) Require an examination of the modified electronic or electromechanical voting system by independent examiners.

(5) After examining the additional information, the modified electronic or electromechanical voting system, or the report of an independent examiner submitted pursuant to subsection (4) of this section, the secretary of state shall approve the modified system by written order if the system satisfies the applicable requirements for certification.

(6) If a modification to a certified electronic or electromechanical voting system does not satisfy the applicable requirements for certification, the secretary of state shall suspend the sale of the system in this state until the system satisfies the requirements for certification.

(7) For purposes of this section, "modification" means a revision or a new release of an electronic or electromechanical voting system.

1-5-619. Temporary use of electronic and electromechanical voting systems.

(1) After an electronic or electromechanical voting system has been tested in accordance with section 1-5-608.5 but has not yet been certified by the secretary of state, a voting system provider or designated election official may apply to the secretary of state for temporary approval of the system.

(2) The secretary of state shall, by rule adopted in accordance with article 4 of title 24, C.R.S., establish standards and procedures for temporary approval of electronic and electromechanical voting systems.

(3) An electronic or electromechanical voting system may be temporarily approved for a total of no more than one year, and the secretary of state may revoke such approval at any time. Temporary approval of a system shall not supersede the certification requirements of this part 6.

(4) A temporarily approved electronic or electromechanical voting system may not be used in any election without the written authorization of the secretary of state.

(5) A designated election official may enter into a contract to rent or lease a temporarily approved electronic or electromechanical voting system for a specific election with the approval of the secretary of state. A political subdivision shall not acquire title to a temporarily approved system.

(6) The use of a temporarily approved electronic or electromechanical voting system shall be valid for all purposes.

1-5-620. Electronic or electromechanical voting system information - software.

When a political subdivision purchases or adopts an electronic or electromechanical voting system, the vendor of the system shall send to the secretary of state copies of the software user and operator manuals, and any other information, specifications, or documentation required by the secretary of state relating to a certified system and its equipment. Any such information or materials that are not on file with and approved by the secretary of state, including any updated or modified materials, shall not be used in an election.

1-5-621. Compliance - definitions. (1) Notwithstanding any provision of law to the contrary, upon filing of a complaint, the secretary of state shall investigate the complaint and may review or inspect the electronic or electromechanical voting system of a political subdivision at any time, including election day, to determine whether the system complies with the applicable requirements of this part 6 or deviates from a certified system.

(2) A voting system provider or a designated election official using an electronic or electromechanical voting system shall give notice to the secretary of state within twenty-four hours of a malfunction of its system in preparation for or during an election. The notice may be verbal or in writing. For purposes of this section, "malfunction" means a deviation from a correct value in a voting system.

(3) Upon receipt of the notice sent pursuant to subsection (2) of this section, the secretary of state shall determine whether further information on the malfunction is required. At the written or verbal request of the secretary of state, the voting system provider or designated election official shall submit a report to the secretary of state's office describing the reprogramming or other actions necessary to correct the malfunction of the electronic or electromechanical voting system. The report shall indicate whether permanent changes are necessary to prevent similar malfunctions in the future. The report shall be submitted within thirty days after the date of the request by the secretary of state. Failure to submit the report within the required period shall be grounds to decertify the system. A copy of the report shall be attached to the most recent certification of the system on file in the secretary of state's office. The secretary of state shall distribute a copy of the report to all political subdivisions that use the system.

(4) If the secretary of state determines after inspecting an electronic or electromechanical voting system or reviewing the report submitted pursuant to subsection (3) of this sec-

tion that the system does not comply with applicable standards or deviates from a certified system, the secretary shall by written order:

(a) Specify actions to remedy the defect in the electronic or electromechanical voting system and direct the designated election official or voting system provider, as appropriate, to perform such actions;

(b) Prohibit the use of the electronic or electromechanical voting system or any part of the system by a political subdivision that adopted the system for use in an election until the actions to remedy the defect are performed and approved by the secretary of state;

(c) Limit the use of the electronic or electromechanical voting system or any part of the system to circumstances or conditions stated in the order; or

(d) Decertify the electronic or electromechanical voting system.

(5) Upon decertification of an electronic or electromechanical voting system, the secretary of state shall notify all political subdivisions that use the system and the providers of the system that the certification of the system for use and sale in this state is withdrawn. The notice shall be in writing and shall indicate the reasons for the decertification of the system and the effective date of the decertification.

(6) Within thirty days after receiving notice from the secretary of state of the decertification of an electronic or electromechanical voting system, a political subdivision or provider of a voting system that is decertified may request in writing that the secretary of state reconsider its decision to decertify the electronic or electromechanical voting system. Upon receipt of the request, the secretary of state shall hold a public hearing to reconsider the decision to decertify the system. Any interested party may submit testimony or documentation in support of or in opposition to the decision to decertify the system. Following the hearing, the secretary of state may affirm or reverse the decision.

(7) The secretary of state shall amend or rescind an order issued under this section if the secretary of state determines that the electronic or electromechanical voting system has been modified to comply with applicable standards or no longer deviates from the certified system.

1-5-622. Special rules applicable to 2007 retesting of voting systems - repeal. (Repealed)

1-5-623. Special rules applicable to use, modification, or purchase of electronic voting devices or systems and related components prior to 2014 - legislative declaration - rules. (1) (a) The general assembly hereby finds and declares that, over the past decade, voting technology used in the state has undergone dramatic changes, creating confusion and difficulties for election administrators, state government, and the voting public. Efforts to address this confusion have been complicated by the timing of periodic substantial investments in voting technology by county governments necessitated by changes in federal and state law.

(b) Now, therefore, by enacting this section, the general assembly intends that:

(I) Between May 15, 2009, and the 2014 general election, any voting system purchased by a political subdivision shall be a paper-based voting system as defined in section 1-1-104 (23.5);

(II) The acquisition of electronic voting systems be suspended in order to assess existing and emerging voting technologies; and

(III) Substantial investment by political subdivisions before the 2014 general election in alternate technologies that will frustrate the intent of the general assembly as specified in paragraph (a) of this subsection (1) is discouraged and disfavored.

(2) Notwithstanding any other provision of this part 6, any existing electronic voting device or any related component of the device that was used by a political subdivision in conducting the 2008 general election may continue to be used by the political subdivision on and after May 15, 2009, as long as the device or component is used in accordance with either the conditions of use under which the device or component was originally certified for the 2008 general election or in accordance with alternate conditions of use established by the secretary of state.

(3) (a) Notwithstanding any other provision of law, on and after May 15, 2009, no political subdivision may purchase a new electronic voting device or system or any related component of such device or system without obtaining the prior approval of the secretary of state for such purchase in accordance with the requirements of this subsection (3).

(b) Subject to the requirements of paragraph (a) of this subsection (3), if a political subdivision desires to purchase a new electronic voting device or system or any related component of such device or system, the political subdivision shall submit a written application to the secretary of state for approval of the purchase. The application shall be made by means of any forms or procedures established by the secretary. Within three business days of receiving the application, the secretary shall grant or deny the application. In reviewing the application, the secretary shall consider, among other relevant factors, the total effect of the purchase at issue in light of other purchases by the political subdivision on voting systems or components of such systems on or after May 15, 2009, and the needs of the political subdivision. In making the determination, the secretary shall prevent political subdivisions from making substantial investments in alternate technologies that will frustrate the intent of the general assembly as specified in subsection (1) of this section and shall consider, among other relevant factors:

(I) Whether the purchase is intended to replace damaged or defective equipment or to accommodate an increase in population in the political subdivision;

(II) Whether the purchase requires a new contract or agreement that would be entered into by the political subdivision and one or more vendors; and

(III) A comparison of the purchase under review with the average capital expenditures by the political subdivision on the administration of elections on an annual basis for the four consecutive years prior to the year in which the application is submitted in order to discourage an investment in technology with a limited useful life in accordance with the intent of the general assembly as specified in subsection (1) of this section.

(4) The secretary of state shall promulgate rules in accordance with article 4 of title 24, C.R.S., as may be necessary to administer and enforce any requirement of this section, including any rules necessary to specify permissible conditions of use governing electronic voting devices or systems or related components of such devices or systems in accordance with the requirements of this part 6.

Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 16-0525.01 Debbie Haskins x2045

HOUSE BILL 16-1257

HOUSE SPONSORSHIP

McCann, Foote, Kagan

SENATE SPONSORSHIP

Scheffel, Johnston, Steadman

House Committees

Legal Services

Senate Committees

A BILL FOR AN ACT

101 CONCERNING IMPLEMENTATION OF RECOMMENDATIONS OF THE
102 COMMITTEE ON LEGAL SERVICES IN CONNECTION WITH
103 LEGISLATIVE REVIEW OF RULES AND REGULATIONS OF STATE
104 AGENCIES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/bills summaries>.)

Committee on Legal Services. Based on the findings and recommendations of the committee on legal services, the bill extends all state agency rules and regulations that were adopted or amended on or

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

after November 1, 2014, and before November 1, 2015, with the exception of the rules and regulations specifically listed in the bill. Those specified rules and regulations will expire as scheduled in the "State Administrative Procedure Act" on May 15, 2016, on the grounds that the rules and regulations either conflict with statute or lack or exceed statutory authority.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Rules and regulations scheduled for expiration**

3 **May 15, 2016 - extension.** (1) Except as indicated, the expiration of all
4 rules and regulations of agencies in the following principal departments,
5 which rules and regulations were adopted or amended on or after
6 November 1, 2014, and before November 1, 2015, and that are therefore
7 scheduled for expiration May 15, 2016, is postponed, and the provisions
8 of section 24-4-108 or 24-34-104, Colorado Revised Statutes, shall apply:

9 (a) Department of agriculture;

10 (b) Department of corrections;

11 (c) Department of education; except that the following rules of the
12 state charter school institute concerning administration of the state charter
13 school institute (1 CCR 302-1) are not extended:

14 (I) Rule 4.00 2), concerning if the applicant is an existing school,
15 the application shall contain a modified subset of the information;

16 (II) Rule 9.00 6), concerning following adoption of content
17 standards pursuant to this section, each institute charter school shall
18 review and revise such content standards;

19 (d) Department of health care policy and financing; except that the
20 following rules are not extended:

21 (I) The following rules of the medical services board concerning
22 medical assistance rules on long-term care (10 CCR 2505-10):

- 1 (A) The definition of "deficiency" in Rule 8.435.1;
- 2 (B) Rule 8.435.2.B. 5., concerning requirements and guidelines
3 for selecting remedies;
- 4 (C) Rule 8.435.2.C. 3. c., concerning the notice requirement for
5 CMP;
- 6 (D) Rule 8.443.9.A. 1. a., concerning appraised value means the
7 determination by a qualified appraiser who is a member of an institute of
8 real estate appraisers or its equivalent;
- 9 (E) Rule 8.443.9.A. 1. h., concerning index means the square foot
10 construction costs for nursing facilities in the Means Square Foot Costs
11 Book;
- 12 (F) Rule 8.481, concerning medical review/independent
13 professional review;
- 14 (G) Rule 8.481.1, concerning responsibility of nursing homes in
15 medical review process;
- 16 (H) Rule 8.482.46 A., concerning services and equipment which
17 are a benefit of Medicare;
- 18 (I) Rule 8.497.1.C., concerning PACE organizations must comply
19 with federal marketing regulations;
- 20 (J) Rule 8.497.2.B., concerning PACE organizations and eligible
21 persons shall comply with all applicable federal regulations regarding
22 PACE enrollment and disenrollment;
- 23 (II) The following rule of the medical services board concerning
24 medical assistance (10 CCR 2505-10): Rule 8.960, concerning the
25 Colorado dental health care program for low-income seniors, including
26 Rules 8.960.1 through 8.960.3.F;
- 27 (e) Department of higher education;

- 1 (f) Department of human services;
- 2 (g) Department of labor and employment;
- 3 (h) Department of law;
- 4 (i) Department of local affairs;
- 5 (j) Department of military and veterans affairs;
- 6 (k) Department of natural resources;
- 7 (l) Department of personnel;
- 8 (m) Department of public health and environment;
- 9 (n) Department of public safety; except that the following rules of
- 10 the director of the division of fire prevention and control concerning the
- 11 fire suppression program (8 CCR 1507-11) are not extended:
 - 12 (I) Rule 6.2.1 3., concerning any work described in this rule that
 - 13 is conducted at any facility owned and operated by a mining company;
 - 14 (II) Rule 9.5 1., concerning an exemption from the incorporation
 - 15 by reference in which the director has the authority to adopt by policy
 - 16 Tentative Interim Amendments (TIAs) issued by the promulgating body
 - 17 of the national code or standard;
 - 18 (III) Rule 10.7.2, concerning all fines collected pursuant to this
 - 19 rule will be deposited in the fire suppression cash fund;
- 20 (o) Department of regulatory agencies; except that the following
- 21 rules are not extended:
 - 22 (I) The following rule of the Colorado dental board, concerning
 - 23 dentists and dental hygienists (3 CCR 709-1): Rule II, concerning
 - 24 financial responsibility exemptions;
 - 25 (II) The following rule of the division of real estate, concerning
 - 26 community association managers (4 CCR 725-7): Rule A-5), concerning
 - 27 community association manager license examination expiration and

1 application requirements;

2 (p) Department of revenue; except that the following rules are not
3 extended:

4 (I) The following rule of the taxpayer service division - tax group,
5 concerning income tax (1 CCR 201-2): Regulation 39-22-622 (3) (a),
6 concerning a return is "filed" on the date the department physically or
7 electronically receives the return;

8 (II) The following rule of the marijuana enforcement division,
9 concerning sales, manufacturing, and dispensing of medical marijuana (1
10 CCR 212-1): Rule M 231.5 B. 1., concerning fingerprints required--any
11 individual applying for a permitted economic interest shall be
12 fingerprinted for a fingerprint-based criminal history record check at the
13 division's discretion;

14 (III) The following rule of the marijuana enforcement division,
15 concerning the retail marijuana code (1 CCR 212-2): Rule R 231.5 B. 1.,
16 concerning fingerprints required--any individual applying for a permitted
17 economic interest shall be fingerprinted for a fingerprint-based criminal
18 history record check at the division's discretion;

19 (q) Department of state; except that the following rules of the
20 secretary of state concerning elections (8 CCR 1505-1) are not extended:

21 (I) Rule 2.10.2, concerning if after the 20-day period outlined in
22 section 1-2-509 (3), C.R.S., the United States Postal Service returns a new
23 voter notification to the county clerk as undeliverable;

24 (II) Rule 6.4, concerning a supervisor judge in a voter service and
25 polling center must complete a training course provided by or approved
26 by the secretary of state;

27 (r) Department of transportation;

1 (s) Department of the treasury.

2 (2) The expiration of all rules and regulations of the public
3 employees' retirement association, which rules and regulations were
4 adopted or amended on or after November 1, 2014, and before November
5 1, 2015, and which are therefore scheduled for expiration May 15, 2016,
6 is postponed.

7 (3) The recommendations of the committee on legal services as
8 reflected in this act apply to the specified rules in the form in which said
9 rules were considered and acted upon by the committee. Any amendments
10 or other changes in the specified rules that became effective before
11 November 1, 2015, that comply with the recommendations of the
12 committee on legal services are not affected by this act. Any subsequent
13 amendments or other changes in the specified rules that became effective
14 on or after November 1, 2015, are not affected by this act.

15 **SECTION 2. Safety clause.** The general assembly hereby finds,
16 determines, and declares that this act is necessary for the immediate
17 preservation of the public peace, health, and safety.