

## Report requested under Sec. 28 of Act 161 (2014)

### Use of Vote Tabulators in Recounts; Certification of Vote Tabulators; Conducting Audits; Voting by Mail; Using Electronic Signatures in Petitions

To: Senate and House Committees on Government Operations

From: Secretary of State's Office, Elections Division

Date: February 5, 2015

Under Section 28 of Act 161 (2014) the House and Senate Committees on Government Operations requested the Secretary of State (SOS) to report on the following items:

1. His or her proposed process for using vote tabulators in recounts;
2. His or her proposed process for the certification of vote tabulators;
3. His or her proposed process for conducting audits of elections;
4. Statistics regarding increased voter participation in jurisdictions which use voting by mail and the feasibility and cost of implementing voting by mail in this state;
5. His or her proposed process for obtaining electronic signatures for municipal meeting articles, nominating municipal officers, and primary petitions.

In considering his proposed process for using vote tabulators in recounts and his proposed process for conducting audits, the SOS was directed to "consult with stakeholders interested in those processes." On December 12, 2014, Elections Director Will Senning met with Thomas Weiss and Jeremy Hansen (in person) and Pamela Smith, President of Verified Voting, (by teleconference) for more than two hours at the Secretary of State's office to gather their input regarding the proposed processes. Input provided by those stakeholders was considered and incorporated where appropriate throughout this report.

The SOS will address each of the above items individually.

#### Executive Summary

**Proposed Process for Using Tabulators in Recounts:** The SOS recommends minor statutory changes to the process described in 17 V.S.A. §§2601-2602k, which have already codified the process of conducting recounts by tabulator. Recommended changes are primarily informed by suggestions arising from the two successful recounts using tabulators in legislative races following the 2014 General Election. Suggestions from interested stakeholders have also been incorporated where appropriate. The SOS recommends including the suggested changes in the 2015 elections bill.

**Proposed Process for the Certification of Vote Tabulators:** The SOS recommends the adoption of an Agency rule that would describe the certification process and requirements for vote tabulators used in Vermont. The SOS is already statutorily mandated, under 17 V.S.A. § 2493, to "adopt rules governing the use and the selection of any vote tabulator in the State". The proposed certification process will be informed by ongoing work occurring at the national level to adopt uniform standards for certification.

**Proposed Process for Conducting Audits of Elections:** The SOS recommends adoption of an Agency rule that would describe the process for conducting audits of elections. Statute currently requires that any Agency rule adopted under 17 V.S.A. §2493(a) regarding the "use and the selection of any vote tabulator in the State . . . shall include requirements that: . . . [t]he Secretary of State shall conduct a random

postelection audit of any polling place election results for a primary or general election within 30 days of the election". The proposed procedure will be informed by the various methods that the SOS has already used in conducting audits, including a successful audit performed following the 2014 General Election using new scanning technology for reading ballots. Suggestions from interested stakeholders will also be addressed and/or included where appropriate.

**Statistics Regarding Increased Voter Participation in Jurisdictions which use Voting by Mail and the Feasibility and Cost of Implementing Voting by Mail in this State:** The vote-by-mail system is only currently used in three states – Washington, Oregon, and Colorado (where it has only been used in the 2014 General Election) – so statistics on increased participation are limited to these states. In general, adoption of the system has resulted in increased participation. Implementation of vote-by-mail in Vermont would significantly increase election costs due primarily to more ballots being printed and the mailing costs to mail a ballot to every registered voter. Implementation would mean a fundamental change to the way we administer elections, requiring significant training for all town clerks and other election officials, as well as a significant voter education outreach effort.

**Proposed Process for Obtaining Electronic Signatures for Municipal Meeting Articles, Nominating Municipal Officers, and Primary Petitions:** The SOS requests more time to research this issue, primarily from a technical perspective. The SOS supports the idea of allowing the use of online software to gather petition signatures, but requests more time to consider whether an online service could be provided by the SOS to gather signatures. The SOS has concerns about allowing the submission of signatures collected through an online signature collection service that is not approved and/or operated by the SOS.

## **1. SOS Proposed Process for Using Vote Tabulators in Recounts**

While Section 28 of Act 161 (2014) requests that the SOS report on his proposed process for using vote tabulators in recounts, it is important to note that the statute already contains detailed provisions on how the recount shall be conducted by vote tabulator. Following this year's General Election, recounts using vote tabulators were successfully and expeditiously conducted in two state representative races (Franklin-2 and Grand Isle-Chittenden) following the current statutory provisions.

As such, the SOS proposes that minor amendments should be made to the existing statute in order to implement our proposed process for conducting recounts by tabulator. These proposed changes are largely informed by suggestions the SOS received from the county clerks and other election officials who participated in the recounts that took place in 2014.

The current statutory procedure for conducting recounts is contained in 17 V.S.A. §§ 2601-2602k. In simple terms, the process proceeds in the same manner as it did when the recount was conducted by hand, except that when it is time to perform the counting of votes, the ballots are run through the tabulator instead of being inspected and having votes tallied by recount teams. The SOS supports this basic approach. The primary and most important additions and revisions to the current statutory process that the SOS will recommend in the elections bill are as follows.

- The same tabulator and/or memory card used in the initial election may not be used in a recount.
- The county clerk shall consult with the SOS to identify a tabulator and memory card that may be used for the recount.

- All memory cards used in a recount shall be programmed in advance of the initial election. This suggestion was made by stakeholders who commented that the integrity of the recount could be questioned if the memory cards were to be programmed following the election. The difficulty with this provision is that it may be costly to program a significant number of memory cards, specifically to be used for recounts, when they may not ultimately be used. Currently, each town that uses a tabulator has both a primary card, and a backup card programmed prior to the election, and the backup cards typically are not used. Because the back-up cards may be used in the event of a recount, there should only be additional cost in the case of towns that use a tabulator for the election if they happen to also use their back up card. So the cost issue is limited to the preparation, before the election, of memory cards that could be used in a recount for towns that count ballots by hand on election night (hand count towns). The SOS is currently working with the company that provides the memory cards to come up with a cost effective way to accomplish this.
- Ballots should not have to be sorted into stacks of fifty and counted before being put through the tabulator. See §2602e. When the recount was conducted by hand, the ballots were sorted into stacks of fifty so that they could be distributed to the recount teams for counting, and so that the number of voted ballots could be compared to the number of voters marked off the checklist. Because the count will be done using the tabulator, the tabulator will produce a count of the ballots after they have been run through the machine. This number can be used to compare to the number of voters marked off the checklist and any discrepancies can be explained by the clerk of the town from which the ballots are being counted. Officials from both of the recounts that occurred this past year indicated that the time spent sorting and counting the ballots, before running them through the tabulator, took the most time of any part of the process and was unnecessary when the number they had counted ended up matching the number of ballots counted by the tabulator and reported on the tape.
- Only the county clerk, any town clerk recruited by the county clerk to assist him or her under § 2602b, or members of the court appointed recount committee may handle the ballots and other contents inside the ballot bag as they are removed from the bags, fed through the tabulator, and reviewed for write-in votes.

These will be the primary changes to the current statutory process suggested by the SOS as part of the elections bill. With the addition of these provisions the SOS is confident that the recount by tabulator process is sound, and will lead to successful, expedient recounts. This is especially critical following the Primary election when the SOS is under a tight deadline contained in federal law to produce ballots to be mailed to military and overseas voters.

Section 28 of Act 161 also asked the SOS to examine under what circumstances a tabulator could be used for a recount in local elections. Current law provides for local elections to be recounted by hand. The SOS recommends that, in towns that use tabulators for local elections, the BCA in those towns be allowed to vote on whether to conduct recounts by tabulator. The voters could also be allowed to make this choice if asked to do so by a petition signed by 5% of the registered voters. If a town chose to do so, the statute could point to the provisions in 17 V.S.A. §§ 2601-2602k by reference for the rules to conduct the recount.

## **2. Proposed process for certification of vote tabulator machines.**

The SOS recommends the adoption of an Agency rule that would describe the certification process and requirements for vote tabulators used in Vermont. Under current federal law there is no specific mandated process for the certification and selection of vote tabulators by states or other political

subdivisions. Under Vermont law, certification and selection of vote tabulators is left to the discretion of the Secretary of State (SOS). This discretion is limited by a number of standards found in state law for voting machines to be used in Vermont.

17 V.S.A. § 2493 directs the Secretary of State's office to "adopt rules governing the use *and the selection* of any vote tabulator in the State" and that "these rules shall include requirements that:

*(1) All municipalities that have voted to use a vote tabulator shall use a uniform vote tabulator approved by the Secretary of State.*

*. . . (4)(A) All vote tabulators shall be set to reject a ballot that contains an overvote and provide the voter the opportunity to correct the overvote, have the ballot declared spoiled, and obtain another ballot. . . .*

*(B) All vote tabulators shall be set not to reject undervotes."*

17 V.S.A. § 2493 then also contains the following requirements for vote tabulators used in Vermont:

*"(d) A vote tabulator shall be a stand-alone device that shall not be connected to any other device or connections such as wireless connections, cable connections, cellular telephones, or telephone lines.*

*(e) A municipality only may use a vote tabulator as provided in this title which registers and counts votes cast on paper ballots and which otherwise meets the requirements of this title. A municipality shall not use any type of voting machine on which a voter casts his or her vote."*

These provisions represent the basic standards that the SOS must apply when making his or her decision to certify a vote tabulator for use in Vermont.<sup>1</sup>

In summary they are:

1. all municipalities shall use a uniform tabulator approved by the SOS;
2. tabulators shall reject overvotes and not reject undervotes;
3. they shall be a "stand alone device"; and
4. they shall register and count votes cast on paper ballots (ie. Not be an automated voting machine without a paper ballot).

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<sup>1</sup> A rule was adopted in March of 1986, (CVR 04-010-001 (Secretary of State Rule Log #86-5), regarding the use and selection of vote tabulators, among other subjects, however it is badly out of date and based at least in part on repealed sections of the law. The Rule did in fact contain the requirement referenced above that vote tabulators must be set to reject overvotes. However, it did not include the clear requirement that all towns use the same voting machine that is required by 17 V.S.A. § 2493(a). It also includes the following language regarding the process for the SOS certification, however the approval is pursuant to a section of the statute that has since been repealed (17 V.S.A. § 2492(a)):

*"Section 6 (Approval of voting machines, devices, or systems). As yet unapproved voting machines, devices, or systems may be approved by the secretary of state, pursuant to 17 V.S.A. § 2492(a), if they meet the standards and specifications established by these rules. Applicants for approval must arrange for a demonstration of equipment at least 60 days before an election is to be held at which the machines, devices, or systems are to be used. Approval, approval with conditions, or denial shall be issued by the secretary of state in writing within ten days of the submission of sufficient information and assurances that the equipment can meet the needs of the community in which it is to be used and the standards set by state statutes and these rules. Statutory Authority: 17 V.S.A. Chapter 51"*

The outdated language and repealed statutory authority contained in this rule reinforce the need to readopt a rule regarding certification that reflects current law and practice, as is suggested here.

Since all towns in Vermont began using the same vote tabulator in 2006, and in accordance with the requirement that all towns use the same vote tabulator, we have used a single model, the Accuvote OS. Since its certification and selection for use, no other tabulators have been certified for use in Vermont.

The SOS does not anticipate needing to replace the vote tabulators currently in use for at least the next two election cycles. Certification of new machines will not be required during that time – meaning there is ample time to develop an effective certification process through the rulemaking procedure.

The SOS proposes that the rules regarding certification should be based on the basic premise that certification will ultimately be left to the discretion of the Secretary of State, that all towns will be required to use the same vote tabulators, and that the basic standards laid out in Vermont statute must be met. Additionally, the SOS proposes that the first threshold any system will have to meet in order to be certified is to receive certification on the federal level by the Election Assistance Commission (EAC).

The desire to establish a uniform process, or at least to develop a uniform set of standards for certification across the country, is a topic of much discussion currently among our colleagues across the country. Election Director Senning has been engaging with his colleagues recently in the early stages of an effort to develop these standards. The EAC does currently have a certification process by which voting machine vendors can have their systems certified. A common approach of many states is to require EAC certification as an initial threshold to be considered for state certification. Some states then choose to layer additional standards and processes on top of EAC certification for approval.

Requiring EAC certification as an initial requirement makes sense to ensure that any system has met basic standards before even being considered for approval in Vermont. Part of the difficulty in establishing a more robust EAC certification process that could be a go to resource for the states has had to do with the fact that the EAC has been without commissioners for the last several years. However, just in the past two months, commissioners have been appointed and the EAC should become more active. This should result in a strengthening of their certification process based on input from Election officials throughout the country.

Director Senning is a member of the National Association of State Election Directors (NASSED) and will be attending their annual meeting in early February, where uniform certification processes will be a primary topic. As such, and for the reasons stated above, the SOS would like to begin the rulemaking process regarding certification of vote tabulators in summer of 2015.

### **3. SOS Proposed Process for Conducting Audits**

In accordance with the statutory mandate, the SOS recommends adoption of an Agency rule that would describe the process for conducting audits of elections. 17 V.S.A. §2493(a) requires the SOS to “adopt rules governing the use and the selection of any vote tabulator in the State” and that “[t]hese rules shall include requirements that: . . . [t]he Secretary of State shall conduct a random postelection audit of any polling place election results for a primary or general election within 30 days of the election.”

The statute goes on to describe in some detail certain requirements that must be included in any proposed rules:

“If the Secretary determines that a random audit shall be conducted of the election results in a town or city, the town clerk shall direct two members of the board of civil

authority to transport the ballot bags to the office of the Secretary not later than 10:00 a.m. on the morning when the Secretary has scheduled the audit.

. . . The Secretary shall open the ballot bags and conduct the audit in the same manner as ballots are counted under sections 2581 through 2588 of this chapter. The Secretary shall publicly announce the results of the audit as well as the results from the original return of the vote.

. . . If the Secretary finds that the audit indicates that there was possible fraud in the count or return of votes, he or she shall refer the results to the Attorney General for possible prosecution.” 17 V.S.A. §2493(a)(3)(B)-(D).

As the Committees are aware, the SOS has been conducting audits following every general election since 2006 in accordance with these requirements, though no formal rule has been adopted. These audits have, without exception, shown no recurring or systemic problems with the performance of the tabulators currently in use. To the contrary, the audits and the various recounts that have occurred since tabulators were put into use (which effectively serve as an additional audit of their own) have consistently shown the results reported by tabulators to be as or more accurate than counts performed by hand. Still, the SOS feels it is important to continually perform audits of our election results in order to maintain the public confidence in their accuracy.

The SOS proposes to engage in this rulemaking within the next calendar year. Because the next General Election does not take place until November of 2016, there is ample time to develop an effective audit process through the rulemaking procedure.

The SOS anticipates that any proposed rule will allow the SOS to use independent vote counting technology approved by the SOS to perform the audit. Whereas audits have been performed in the past through a manual hand count of the ballots, ballot reading and vote counting technology is advancing at a rapid rate and the SOS will seek the authority to forgo further hand counting of ballots in favor of ballot counting technology that allows for a more robust audit.

With the new ballot scanning technology being developed, the SOS is able to audit all races across an entire ballot in a matter of minutes. When audits were performed by hand, only two races from each election were reviewed by the audit in order to be able to perform the audit in a single day. Additionally, the speed of the count performed by these new technologies allows the SOS to audit more towns in far less time.

In short, a more thorough audit of more towns can be performed in a shorter time. In addition, the new technology now creates an image of each ballot that can be stored for further inspection by the public. An image of each ballot, and a detailed image of each marking on each ballot, can be displayed, allowing the public to review how individual votes were assigned, or not assigned, to a given candidate. If the ballots are kept in order as they are removed from the machine, the actual printed ballot can be easily retrieved to check the accuracy of the image being displayed by the technology. In addition, this database of ballot images will be a public resource that can allow review of voted ballots by the public and also be used by those who are interested in conducting a risk limiting audit of election results.

Following the 2016 General Election, in November of 2014, the SOS performed its audit using a scanning technology which ran the ballots from six towns through high-speed scanners over the course of

approximately 4 hours. Every vote in all races were counted and compared to the results obtained on election night by the vote tabulator. An image of every ballot cast across the six towns audited is now saved and sequentially ordered. The SOS was sufficiently satisfied with this pilot test of this technology that any proposed rule will allow for this type of technology to be used to perform the audit. If the Committee is interested, the SOS is willing to provide a brief demonstration of this technology and its utility in performing far more robust audits than we have been able to in the past.

**4. Statistics regarding increased voter participation in jurisdictions which use voting by mail and the feasibility and cost of implementing voting by mail in this state.**

The vote-by-mail system is most simply described as a system in which a ballot is mailed to every registered voter. If the ballot is not returned by the voter, they can vote at the polls on Election Day.

The vote-by-mail system is only currently used in three states – Washington, Oregon, and Colorado. As a result, statistics on increased participation are limited to these states. In Colorado, it was only first used in the 2014 General Election, so any trend has not yet developed. In Washington, the system has been implemented over time. Vote by mail was only done at the local level from 1987 until 1993. It began being used for statewide elections, county by county, in 1993. By 2007, 36 of 39 counties were using the system. In Oregon, the system was adopted statewide in 1998 by voter initiative.

In Colorado, participation dropped significantly in 2014, the first time vote-by-mail was used, however voter participation was extremely low nationwide and this number probably reflects that general trend more than the adoption of the vote-by mail-system. The same drop in participation can be seen in the other two states in 2014, likely explained again by the nationwide trend. With that exception, voter participation has generally increased in Oregon and Washington since the vote-by-mail system was adopted.

The SOS provides the following data retrieved from generally available information on the Secretary of States’ website in the states listed. If the committee would like more detailed information on the success of the vote-by-mail systems in these states the SOS will gladly consult with their colleagues in those states for a more detailed analysis.

**Voter Turn Out Percentages – General Elections 2000-2014 – OR, WA, and CO**

| <b>Year</b> | <b>Oregon</b> | <b>Washington</b> | <b>Colorado</b> |
|-------------|---------------|-------------------|-----------------|
| <b>2014</b> | <b>70.9</b>   | <b>54.16</b>      | <b>57.11</b>    |
| <b>2012</b> | <b>82.8</b>   | <b>81.25</b>      | <b>71.17</b>    |
| <b>2010</b> | <b>71.89</b>  | <b>71.24</b>      | <b>73.49</b>    |
| <b>2008</b> | <b>85.67</b>  | <b>84.6</b>       | <b>91.68</b>    |
| <b>2006</b> | <b>70.81</b>  | <b>65</b>         | <b>62.59</b>    |
| <b>2004</b> | <b>86.48</b>  | <b>82</b>         | <b>89.33</b>    |
| <b>2002</b> | <b>69.09</b>  | <b>56</b>         | <b>49.45</b>    |
| <b>2000</b> | <b>79.8</b>   | <b>76</b>         | <b>na</b>       |

Implementation of vote-by-mail in Vermont would significantly increase election costs. The Secretary of State would be required to print a ballot for every registered voter to be mailed to each of them. Additional ballots would have to be printed for use on Election Day. Currently, the Secretary of State prints a number of ballots for each major party equal to 50% of the checklist for the Primary Election, and a number of ballots equal to 100% of the registered voters for the General election. 40% of these are scored to be able to send to absentee voters. Having to print a number of ballots equal to more than 100% of the registered voters for both the Primary and General Elections will significantly increase the ballot printing costs to the state. The cost of mailing a ballot to every registered voter would also represent a significant increase in the overall cost of the election. Because Election Day voting remains an option for all voters, all of the costs incidental to administering the election on Election Day would remain the same.

Additionally and perhaps as important as the significant increase in cost is that implementation of the vote-by-mail system in Vermont would mean a fundamental change in the way we administer elections. This change would require a significant amount of training for all town clerks and other election officials, as well as a significant voter education outreach effort. Both of these would come at an increased cost to the state and should council any decision on the rate at which to implement this change.

#### **5. SOS proposed process for obtaining electronic signatures for municipal meeting articles, nominating municipal officers, and primary petitions.**

The SOS requests more time to research this issue, primarily from a technical perspective. The SOS supports the idea of allowing the use of online software to gather petition signatures, but requests more time to consider whether an online service could be provided by the SOS to gather signatures. The SOS has concerns about allowing the submission of signatures collected through an online signature collection service that is not operated by the SOS.

As the committee members have surely all seen at some time, many websites and web services provide software that can gather electronic signatures on online petitions and generate those petitions for submission. It is these types of services that have been referenced in discussions that the SOS has had with constituents that have requested the ability to collect signatures for petitions online. At this time, the SOS does not support the idea of allowing a voter or candidate to collect signatures for a petition through one of these private services for submission under Vermont law. Instead, the SOS is willing to consider the development of an SOS operated system for obtaining petition signatures online.

As the committee members are also likely aware, the SOS is currently engaged in the process of converting many of its own filing systems to online technology, and has allowed the use of electronic signatures for many documents currently being filed with our Office. While the SOS has concerns with allowing the use of outside, private services, it may be possible for the SOS to develop its own secure, state-managed service for circulating online petitions. For example, a voter wanting to circulate a petition, or a candidate collecting signatures to appear on the ballot, could set up an online account with the SOS and through that account generate a petition that could be emailed to voters for their signature. Or the user could direct voters to a secure web address where the system generated petition could be signed.

The SOS is currently in the development process of the new statewide voter checklist. If the committees are interested in moving forward with allowing the use of online petitions to comply with the petition requirements in the election law, the SOS will consult with their developers about the cost and



feasibility of incorporating this functionality into the statewide voter checklist system. Developed in conjunction with the new statewide voter checklist, such a system would have the potential of allowing a clerk to instantaneously verify that the names on the petition are registered voters on the checklist, which would be a significant administrative time savings for the clerks.

Again, if the committees are interested, the SOS will explore the possibility of developing a system that could provide a means to circulate an online petition using secure, state-managed software that works in conjunction with the statewide checklist system to verify signatures. The SOS can report back to the committee on the feasibility and likely cost of such a system.