

## California Secretary of State

### INITIAL STATEMENT OF REASONS

Hearing Date: No hearing date is scheduled. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the contact person listed no later than 15 days prior to the close of the written comment period.

Written Public Comment Period: August 22, 2014, through October 10, 2014.

Subject Matter of Proposed Regulations: Escrow of Source Codes

Section(s) Affected: Section 20610 through 20682 of Title 2, Division 7, Chapter 6 of the California Code of Regulations.

#### Specific Purpose of each adoption, amendment, or repeal:

Current regulations require ballot tally source code to be stored in escrow. The current ballot tally regulations were promulgated in 1995 and have not been changed since. AB 829 and SB 360 added election management system (EMS), ballot marking system, and voting systems source codes to be placed in escrow.

The purpose of revising sections 20610 through 20682 of Title 2, Division 7, Chapter 6 of the California Code of Regulations is as follows:

1. Reflect the changes in current business practices
2. Remove requirements that are no longer relevant
3. Add EMS source code in accordance with AB 829 (Fong)
4. Replace ballot tally software program source code with the term "voting system source code(s)" in accordance with SB 360 (Padilla)
5. Add ballot marking system source code(s) in accordance with SB 360 (Padilla)

#### Factual Basis/Rationale

Section 20610 – Language that is specific to ballot tally software programs has been deleted because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. Government Code and Elections Code have changed due

to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20611 –The term “ballot tally software program” has been removed and language added to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The subsection numbering has been changed to lettering for consistency. In (a) language specific to only the ballot tally software program source codes has been removed because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. In subsection (d) language was added to protect the ability to gain access to the source code. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20612 – In (a) the term “ballot tally software” has been removed and replaced with “voting system or ballot marking system” to reflect the change in statutory requirements, consistent with California Elections Code. Subsection (b) has been added to specifically address the timing for the placement in escrow for election management systems. This timing was chosen based upon input from the two EMS vendors, given that EMS source code does not have the same requirements as voting systems or ballot marking devices under the Elections Code. The Elections Code is changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20613 – The Government Code and Elections Code have changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20620 – Section 20620 is no longer relevant. New definitions specific to voting system, ballot marking system, and election management system are proposed in newly numbered section 20620 (see below). Accordingly, 20620 is proposed to be deleted.

Section 20621 – Section 20621 has been renumbered to Section 20620. The definition of “ballot tally software program” is deleted because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. Definitions for voting system, ballot marking system, and election management system are proposed. These definitions are consistent with California Elections Code. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20622 – Section 20622 has been renumbered to Section 20621. The title of the section is changed to remove ballot tally program because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The old source language examples (Ada, Assembler, COBOL, and Fortran) have been deleted and new source languages are proposed to be added (C++, C#, Visual Basic, and Java). The old source languages are out of date and no longer used. New subsections (a), (b) and (c) have been added to add voting system, ballot marking system, and election management system source code definitions in order to distinguish between the three. These definitions were chosen by combining the definition of voting system, ballot marking system, and election management system from California Elections Code, and incorporating the requirements of Elections Code sections 19212 and 2501. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20623 – Section 20623 is renumbered to Section 20622. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20624 – Section 20624 is renumbered to Section 20623. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20625 – Section 20625 is renumbered to Section 20624. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20626 – Section 20626 is renumbered to Section 20625. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20627 – Section 20627 is renumbered to Section 20626. The term “ballot tally software program” has been removed and language added to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20630 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20631 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20632 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20633 – The subsection numbering has been changed to lettering for consistency with the rest of the regulations. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20635 – Section 20635 is renumbered to Section 20634. The subsection numbering has been changed to lettering for consistency with the rest of the regulations. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20636 – Section 20636 is renumbered to Section 20635. The subsection numbering has been changed to lettering for consistency with the rest of the regulations. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20637 – Section 20637 is renumbered to Section 20636. The subsection numbering has been changed to lettering for consistency with the rest of the regulations. The term “ballot tally software program” in subsections (a) and (c) has been removed and language added to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20638 – Section 20638 is renumbered to Section 20637. The term “ballot tally software program” has been removed to reflect the broader application of these proposed regulations, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20639 – Section 20639 is renumbered to Section 20638. The first class mailing requirement is deleted in order to not be limited to only mailing when sending the complete list of all certified escrow companies and their facilities approved for use in California. Also, the requirement to mail to the chairperson of each county board of supervisors is deleted because this is an outdated mailing requirement. The county chief elections official is sufficient for mailing. The term “ballot tally software program” has been removed and language added to reflect the change in statutory requirements because the application of these proposed

regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20640 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20641 – The subsection numbering has been changed to lettering for consistency with the rest of the regulations. The term “ballot tally software program” in subsection (c) has been removed and language added to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Sections 20642 – The requirements for submission of source code are proposed to follow section 20612 for placement of source code in escrow. The ballot tally reference is removed because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20645 – Section 20645 is renumbered to Section 20643. The tally ballots reference is removed because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20646 – Section 20646 is renumbered to Section 20644. The tally ballots reference is removed and language added to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. Subsection (b) proposes to add election management system instructions for modifications. This timing was chosen based upon input from the two EMS vendors in California, given that EMS source code does not have the same requirements as voting systems or ballot marking devices under the Elections Code. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20650 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20651 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20652 – The escrow company and escrow facility applications have been revised and combined into one form. This section now incorporates by reference the application form, Escrow Company and Facility Application (2014). The reference to Appendix A where the application form was previously printed has been deleted. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20653 – The escrow company and escrow facility applications have been revised and combined into one form. This section now incorporates by reference the application form, Escrow Company and Facility Application (2014). The reference to Appendix A where the application form was previously printed has been deleted. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20654 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20660 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20661 – In subsection (a), the reference to Appendix B, which contained the Notice of Approval issued by the Secretary of State has been deleted. The Notice of Approval does not contain any regulatory information, but nevertheless is being incorporated by reference for easy reference for escrow companies and facilities. In subsection (b), the ballot tally software program reference is removed to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20662 – The ballot tally software program reference is removed to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. In subsection (a) the temperature

set point with plus and minus degrees has been changed to temperature ranges that are consistent with industry standards. In subsection (e), “store each source code separately” has been removed to allow vendors with multiple source codes to be able to store them together. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20663 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20670 –In subsection (a), “voter registration” has been added to what may be investigated pursuant to these regulations. This is added because the EMS are systems that manage the county voter registration databases. With the addition of EMS source code required to be placed in escrow, this addition reflects the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. Subsection (c) is added to allow the Secretary of State to be able to audit escrow to verify contents. Without an ability to audit the source code in escrow, the Secretary of State cannot confirm that what is used in California is actually what is being held in escrow. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20671 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20672 – The ballot tally software program references are removed to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20680 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20681 – The ballot tally software program references are removed to reflect the change in statutory requirements because the application of these proposed regulations is now broader, encompassing voting systems, ballot marking systems and election management systems. The subsection labeling has been changed for consistency with the rest of the regulations. The Elections

Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Section 20682 – The Elections Code has changed due to the legislative changes made by SB 360. Accordingly, reference and authority citations have been changed to reflect current codes.

Appendix A and Appendix B – The escrow company and escrow facility applications have been revised and combined into one form. Section 20652 now incorporates by reference the application form, Escrow Company and Facility Application (2014). Appendix A and Appendix B where the application forms were previously printed have been deleted.

#### Underlying Data

The Secretary of State did not rely on any technical, theoretical or empirical studies or reports in proposing the amendment and adoption of these regulations.

#### Documents Relied Upon

The Secretary of State did rely upon the Economic Impact Assessment in making the determinations set forth in the fiscal impact estimates and economic impact assessment section of the Notice of Proposed Rulemaking Action.

#### Business Impact

The proposed regulation and amendments to existing regulations merely propose to implement, interpret or make specific existing requirements and procedures for voting systems. The proposed regulation and amendments to existing regulations, therefore, have no impact directly affecting business.

#### Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The alternative to these regulations is to not change them which results in having provisions that don't match current business practices.