

STATE BOARD OF ELECTIONS

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Robert L. Walker, Chairman
Bobbie S. Mack, Vice Chairman
Rachel T. McGuckian
David J. McManus, Jr.
Charles E. Thomann



Linda H. Lamone
Administrator

Ross Goldstein
Deputy Administrator

Agenda

State Board Meeting

August 23, 2012

2:00 PM

State Board Office

151 West Street, Suite 200

Annapolis, Maryland 21401

1. Declaration of Quorum Present
2. Approval of Prior Meeting Minutes
3. Additions to the Agenda
4. Administrator's Report
5. Assistant Attorney General's Report
6. Approval of Regulations
7. Waivers of Campaign Finance Late Fees
8. Request for Precinct Changes
9. Demonstration of Online Voter Services
10. Old Business
11. New Business
12. Confirm Next Meeting Date
13. Adjournment

Public Participation

The members of the public may address the Board on any item on this agenda. Pursuant to §3.2B of the Board's bylaws, public participation at a meeting must be pre-scheduled and pre-approved by the Chairman. To obtain approval to speak at a board meeting, please contact Ross Goldstein at 410-269-2877 or by email rgoldstein@elections.state.md.us no later than 5:00 pm the day before the meeting.

Attendees: Robert Walker, Chair
Bobbie Mack, Vice Chair
Rachel McGuckian, Member
David McManus, Member
Chuck Thomann, Member
Ross Goldstein, Deputy Administrator
Jeffrey Darsie, Assistant Attorney General
Donna Duncan, Election Management Director
Paul Aumayr, Director, Voting Systems
Keith Ross, Assistant Deputy for Project Management
Victorica Smith, Campaign Finance Division

Also Present: Barbara Sanders, League of Women Voters of Maryland
Katie Brown, Baltimore County Board of Elections
Rena Waggoner, Baltimore County Board of Elections
Holly Joseph

DECLARATION OF QUORUM PRESENT

Chairman Walker called the meeting to order at 2:00 pm and declared that a quorum was present.

APPROVAL OF THE PRIOR BOARD MEETING MINUTES

The minutes of the May 24, 2012, board meeting were presented for approval. The minutes were approved unanimously.

ADMINISTRATOR'S REPORT

Ross Goldstein presented the Administrator's Report.

1. Meetings and Important Dates

Maryland Association of Election Officials' (MAEO) Annual Conference

MAEO held its annual conference on June 4th and 5th. MAEO elected a new president and board. Gail Hatfield of Calvert County was elected to serve as president of MAEO, and we congratulate her and look forward to continuing SBE's collaborative relationship with MAEO. The conference included a local board attorney breakout sessions facilitated by Jeff Darsie and Nikki Trella, a local board member session conducted by Ross Goldstein, and a Presidential Primary Election Lessons Learned session conducted by Keith Ross. The sessions were all productive and well received. In addition two Election Preparedness and Professional Development (EPPD) Program classes were presented during one full day of the conference. One class conducted by Rick Urps focused on adult learning and teaching techniques as they relate to training election judges, and the other class conducted by Guy Mickley, Director of the Howard County Board of Elections focused on preparing for legislative reapportionment.

Electronic Registration Information Center (ERIC)

The first meeting of the ERIC board was June 25th – 26th in Denver, Colorado. Linda Lamone and Stacey Johnson attended the first meeting where Ms. Lamone was elected to serve as the treasurer for the organization.

2. Election Reform & Management

Online Voter Services Project Update

Work on SBE's voter services website is on-going. The voter look-up and polling place locator will "go live" on July 1, 2012. SBE and representatives of various local boards of elections tested these websites and provided feedback and suggestions. SBE's agreement with University of Maryland College Park ends on June 30th, and SBE would like to thank the Center for American

Politics and Citizenship at College Park for their efforts over the last several years to improve voters' access to important election information and electronically deliver absentee ballots.

Online voter registration is on track to be ready in July 2012. Chere' Evans received the final information from MVA and is finishing up its development. SBE will continue testing, and the local boards will be asked to test the system next week.

Development on the online absentee ballot delivery system is also progressing. Ms. Trella created a working group of local boards of elections to draft canvassing procedures for ballots that are delivered electronically. Ms. Trella and Ms. Evans provided an online demonstration on the new ballot delivery system, and the canvassing procedures are moving along and will be complete in mid-July. All local boards will be participating in a mock canvass at the end of July. During this mock canvass, they will use the online ballot marking wizard to make selections and print ballots, generate scannable ballots, compare the ballot generated from the barcode against the ballot printed from the wizard, and feed the ballot into an optical scan voting unit.

The security consultant is continuing his work. He recently conducted a security scan and submitted a draft System Security Plan. The project team is in the process of reviewing the draft plan and will address each item as appropriate. Deque Systems, the vendor selected to conduct an accessibility review, has begun its work. They are reviewing each web page of the voter look-up, polling place locator, online voter registration, online ballot delivery system, and election results pages. Their review is expected to be completed by mid-July. Barcode scanners and ballot paper have also been procured.

David McManus requested that staff provide at the next meeting a demonstration to the Board of the new online voter services.

Federal Voting Assistance Program (FVAP): Post-Election Report for Grant Recipients

Janet Smith and Ms. Trella compiled and submitted the 2012 Post-Primary Election Report. As an FVAP grant recipient, SBE is required to submit this report after each election during the grant period. The report included various data related to military and overseas voters and historical data on ballot transit time. The 2012 Post-General Election Report will include more comparative analysis as the programs funded by the grant will be in effect.

2012 Primary Election Audit

SBE will be conducting its post-election audit of the local boards of elections. SBE staff members are reviewing documents submitted by the local boards of elections, and the goal is to have the audit reports complete by August 2012. Chairman Walker requested a copy of the audit be provided to the Board upon its completion.

3. Voter Registration

Referendum Petitions

The Civil Marriage referendum petition exceeded the minimum initial one-third requirement of the Maryland Constitution for placing the Act on the November 2012 ballot. Additional petition signatures were submitted to the Secretary of State's office on Monday, June 25th.

The Congressional Districting referendum petition also met the initial one-third requirement. The sponsor plans on submitting the second two-thirds on the June 30th deadline.

4. Candidacy and Campaign Finance

Commission to Study Campaign Finance Laws

The Commission listened to testimony on June 12th and 13th regarding multiple topics including increasing the contribution limits, public financing, legislative slates, and limited liability companies. The Commission held a discussion meeting on June 18th on contribution limits. The next meeting is set for July 16th.

MD CRIS (Campaign Reporting and Information System)

At SBE's direction, PCC Technology Group is updating MD CRIS to accommodate the new legislative changes from the past session. The biggest addition is Employer/Occupation. Once the change is approved and released into production, it will be automatically updated for every user. In the past, this change would have required mailing out a new ELECTTrack CD containing a patch to all filers.

Seminars/Trainings

Jared DeMarinis held a campaign finance and MD CRIS training class on June 12th for the Democratic Senate Caucus treasurers at the request of the Caucus. It was attended by over 15 people. On June 19th, Mr. DeMarinis conducted a training class for the public on MD CRIS. It was attended by over 20 people. The Maryland Republican Party has reached out to Mr. DeMarinis to schedule trainings for its members over the next month.

5. Voting Systems

Electronic Pollbook Software Update.

SBE received the latest software on Friday, and the team is presently testing this version and will continue to do so for another week or two. If the software is satisfactory, ES&S will be notified and a final build will be supplied to SBE and provided to the local boards for them to update their inventory of pollbooks. There are 6,500 pollbooks in the State, and it is anticipated that this will take approximately 6 weeks. SBE has been working with ES&S to define best practices for the update and to review relevant documentation.

Election Night Reporting

SBE has been migrating the Election Night Reporting system to a new server and has been testing the configuration and performance of this server. This included a test involving all the local boards on Monday, June 18th, with the local boards transferring 2008 General Election results to SBE. This test was generally a success. It should be noted that there will be further testing closer to the November election, with test results of the actual 2012 contests and questions.

Municipal Elections

The voting system was used in municipal elections in Frostburg and Cambridge (primary). The Cambridge General Election is July, 8th, and they will again utilize the voting system. SBE supplied the pollbook databases, and the local boards programmed the voting units.

Meeting

Paul Aumayr attended a conference for State Certification Testing of Voting Systems at Ball State University, Indiana on June 14th and 15th. The conference brought in representatives from many States, including California, Georgia, Arizona, Colorado, Indiana and Ohio as well as the EAC and the Voting System Testing Laboratories.

6. Project Management (PM) and Information Technology (IT)

PM – Project Oversight

Mr. Ross continues to develop and refine project management templates and other resources to be used by the agency and, when requested, the local boards. In addition, Mr. Ross is developing a Master Project Tracking list that will help SBE prioritize existing projects and forecast future projects. He is also in the peer review phase of the contract monitoring procedures for SBE project managers. The tasks include executing internal audits of timesheets, deliverables, and the associated invoices. Finally, Mr. Ross is continuing to facilitate the monthly SBE Information Technology Strategy Board (ITSB) whose purpose is to address SBE's technology issues in the short and long term.

PM – Inventory Management Project.

Staff is in the second phase of the 2012 physical inventory with a focus on reconciling the equipment and furniture reports from SBE and the local boards. Staff is performing a number of new tasks that will allow more accurate tracking of the over 36,000 pieces of equipment. The entire 2012 inventory is expected to be completed in July. At the same time, staff is evaluating election based asset/inventory systems from several different vendors in the hopes of identifying a system that will meet our long term needs.

PM – Call Center

Staff continued to work with CR Dynamics, the call center vendor, in preparation for the 2012 General Election and the support that will be provided. A major focus has been streamlining the questions and answers that will be handled by the call center.

Google Apps

Staff continued work on the requirements and planning for the SBE Google Apps on-going transition of individuals. The plans are to transition 2 additional SBE staff members in addition to the staff of 3 local boards (Caroline, Queen Anne's, and Worcester). The three local boards currently have Yahoo and Verizon email accounts. After this transition, there will be 9 SBE staff members and a total of 11 local board staff members using Google Apps. The remainder of SBE staff is expected to transition sometime after the 2012 General Election. In the longer term the option of transition to Google Apps will be offered to the other local boards.

IT – MD CRIS File Format

Kurt Snyder has been working with PCC (MD CRIS vendor) to confirm that the published file format description is consistent with the actual file format that is allowed to be imported into the MD CRIS campaign finance system. There have been several differences between the published reference document and the allowable import file which were discovered during testing. Mr. Snyder also discovered that the error file as returned by the system for records that are rejected on import is slightly different from the published file format. PCC staff members are working to correct problems discovered and advise on the proper file format description and the specification of test records.

IT – Disposal of Equipment at the Warehouse

Hard drives in equipment at the warehouse have been removed. Some of the items have been sold on the State's auction site, and the winners of some of the bids are scheduled to retrieve associated equipment from the warehouse. Equipment is being disposed according to DGS' guidelines for disposal of such sensitive items.

Other IT Related Events

- Successfully applied Microsoft Security updates for the month of June 2012 on SBE Server Systems
- Renewed various computer hardware support warranties.
- Renewed several software support warranties.
- Janey Hegarty has been busy with CJIS background checks procedures for new hires across the State.
- Natasha Walker completed several website updates as requested.
- Four (4) new workstations for Dorchester County have been delivered to the County.
- Daniel assisted Montgomery County with their inventory verification process for 5 days.

ASSISTANT ATTORNEY GENERAL'S REPORT

Jeffrey Darsie, Assistant Attorney General, reported to the Board that the Supreme Court recently summarily affirmed the decision of the 4th Circuit panel in *Fletcher v. Lamone*, upholding the constitutionality of Maryland's "No Representation Without Population Act." The law adjusts census data for redistricting purposes by counting prisoners as residents of their last known legal address, rather than as residents of their place of incarceration. Maryland's law is the first measure of its kind to be considered by the Court.

On June 13th, the Maryland Court of Appeals affirmed the Circuit Court's decision that the Maryland DREAM Act does not make an appropriation and therefore is referable. The Court's order was issued without an opinion the day after oral argument. The result of the ruling is that the question whether to approve or reject the DREAM Act will be on the ballot for the 2012 General Election.

On June 25th, the Court of Appeals ruled in favor of the Frederick County Board of Elections in a challenge to the board's rejection of a charter board nominating petition as insufficient. The Court found that Maryland's petition signature standards as applied to a charter board nominating petition to be constitution in that it only imposed a minimal burden on petition signers and was a reasonable, nondiscriminatory measure to prevent fraud and identify signers.

APPROVAL OF REGULATIONS

Mr. Goldstein presented various proposed changes to Title 33 of COMAR for final adoption.

1. 33.07.07.01 & .02 (Challengers and Watchers) – corrective and clarifying changes
2. 22.08.04.01 and .05 - .06 (Canvassing – Central Count Procedures) – establishes canvassing procedures for ballots duplicated using the barcode (created by the online ballot marking tool) and the ballot on demand printer
3. 33.13.06 (Campaign Accounts) – definition of financial institution

Ms. McGuckian made a motion to approve the above referenced regulations for final adoption, which was seconded by Mr. Thomann. The motion was unanimously approved.

Mr. Goldstein next presented several proposed additions and changes to Title 33 of COMAR for approval.

1. 33.13.02.02 (Campaign Finance Report – Required Contents)
2. 33.04.02.01 (Inspection and copying of Public Records – Confidentiality of Certain Information)

The General Assembly passed legislation requiring employer and occupation information for all contributors who give \$500 or more in the aggregate to a single committee. The proposed changes to COMAR 33.13 establishes standards for supplying employer and occupation information and provides a process for the political committee to follow in the event that a contributor does not provide the requested information. The regulations also update information required on all of the recently approved contribution and expenditure methods. The proposed changes to COMAR 33.04.02.01 allow a contributor to request to have his or her personal information be kept confidential.

Ms. Mack made a motion to approve the above referenced regulations, which was seconded by Ms. McGuckian. The motion was unanimously approved.

REVISIONS TO ABSENTEE BALLOT APPLICATION

Mr. Goldstein presented two revised *Absentee Ballot Applications* for the Board's approval. The form that will ultimately be used for the upcoming 2012 Presidential General Election will depend on the outcome of the pending Opinion of the Attorney General regarding whether the ballot marking tool requires certification under EL §9-102.

- Form 1 – provides the option of having the absentee ballot "posted to the State Board of Elections' website" only for military voters, dependants of a military voter, or voters who live outside of the United States. This form will be used in the event that the opinion concludes that certification is required for the online ballot marking tool. Electronic delivery of ballots is a requirement under the federal MOVE Act. Accordingly, even if the online ballot marking tool is not available for use, military and overseas voters still must be given the option of receiving their ballots via some form of electronic delivery.
- Form 2 – provides the option of having the absentee ballot "posted to the State Board of Elections' website" for either (a) military voters, dependants of a military voter, or voters who live outside of the United States; or (b) a voter with a disability who could use the accessible online ballot marking tool to assist with voting independently. This form will be used in the event that the opinion concludes that certification is not required for the online ballot marking tool. In this instance, electronic delivery and online marking will be made available to both

military and overseas voters as well as voters with disabilities who will benefit from using accessible interfaces with the ballot marking wizard to vote independently.

Mr. Goldstein noted that in either case, the scope of the use of the online delivery method is being significantly reduced since domestic voters who are not disabled will not be able to receive their ballots via this method.

Mr. Thomann made a motion to approve both forms for use pending the AG's Opinion, which was seconded by Ms. McGuckian. The motion was unanimously approved.

WAIVERS OF CAMPAIGN FINANCE LATE FEES

Mr. Goldstein presented the following recommendations of the State Administrator for approval of waivers of late fees.

1. Conservatives for Maryland PAC
2. Crook, Donna J. for Board of Education
3. Cusimano, Colleen Campaign
4. Frick, Bill Friends of
5. Goddard, Urcille For the People
6. Howard, Carolyn J. B. Friends Of
7. Lisanti, Mary Ann Friends Of
8. Magee, Peggy friends of
9. Project Millions More Movement Baltimore PAC
10. Rose, Joel Citizens for
11. Smith, Derrick Citizens to Elect
12. Trapani, Paul Citizens Getting It Right With

Ms. Mack made a motion to approve the Administrator's recommended late fee waivers, which was seconded by Mr. McManus. The motion was unanimously approved.

REQUESTS FOR PRECINCT CHANGES

Donna Duncan explained that local boards generally have the authority to change precincts without State Board approval. However, between a primary and general election, all changes must be approved by the Board.

First, Ms. Duncan presented a Baltimore County request to change the boundary line in Election District 2 for Precincts 25 and 08. Currently, the boundary line splits The Villages of Woodholme Retirement Community so that 228 homes vote in Precinct 25 and 58 homes vote in Precinct 08. The change would allow all of the homes in the community to vote in Precinct 25. Ms. Mack made a motion to approve the boundary change, which was seconded by Mr. McManus. The motion was unanimously approved.

Second, Ms. Duncan presented a Harford County request to change the location of Precinct 03-15 from the Harford Day School to the South Hampton Middle School. The reason for the change was that the Harford Day School is no longer willing to serve as a polling location. Ms. Mack made a motion to approve the polling place change, which was seconded by Mr. Thomann. The motion was unanimously approved.

Third, Ms. Duncan presented a request from Talbot County to change three polling places back to their original locations. Ms. Duncan explained that, as a cost saving measure, the Talbot County Board of Elections consolidated three precincts into one polling location. However, due to community pressure, concerns about lines on election day, and funding commitments by the county, they are now seeking to return the polling places to their original locations as follows:

- Royal Oak Methodist Church– 02-03
- Bozman Church – 02-02
- Tilgham – 05-02

Mr. Thomann made a motion to approve the polling place changes, which was seconded by Ms. McGuckian. The motion was unanimously approved.

Finally, Ms. Duncan presented a request from Washington County to change the location of Precinct 18-01 from Chewsville Community Center to the Bethel United Methodist Church. The reason for the change was that the community center was not permitting the local board access to the center the night before the election to set up the polling place, which is necessary to ensure on-time opening. Mr. Thomann made a motion to approve the polling place change, which was seconded by Ms. Mack. The motion was unanimously approved.

OLD BUSINESS

There was no old business.

NEW BUSINESS

Ross Goldstein asked the Board to approve the amended bylaws from the Howard County Board of Elections. Mr. Goldstein noted that the bylaws complied with SBE's model bylaws. Ms. Mack made a motion to approve the by-laws for the Howard County Board of Elections, which was seconded by Ms. McGuckian. The motion was unanimously approved.

SCHEDULING OF NEXT MEETING

The next meeting is scheduled for July 26th at 2:00p.m.

ADJOURNMENT

Mr. Walker adjourned the meeting at 2:50 pm.

1. Announcements

Valerie O'Connor, who has served as the State Board's chief budget and fiscal officer, is retiring next month. Valerie has been with the State since 2001 and with SBE for a little over three years. During that time Valerie has made a tremendous contribution to the overall management of SBE's finances and accounting practices. We are grateful for her hard-work and wish her a happy retirement.

Michelle (Shelly) Holland has been hired to fill the position created by Valerie's retirement. Shelly has been employed by the State for 10 years. Her last agency was the Maryland Transportation Authority where she was the Director of Revenue. She cites as one of her major accomplishments interfacing the MDTA accounting system with the EZPass database and accounting systems. Shelly has also served as an election judge in Kent County for several elections.

2. Meetings and Important Dates

National Association of State Election Directors

The National Association of State Election Directors met in Boston for its Summer Meeting from August 17 through August 19. Topics included a briefing from the Elections Assistance Commission, the introduction of the Acting Director of the FVAP, a session on benchmarking, a discussion of new technology in elections (on-line voter registration, on-line ballot delivery, and e-poll books), best practices in state and local election official cooperation, a review of current and recent lawsuits, and a discussion of federal and state legislation.

Maryland Association of Counties (MACo) Annual Conference

Ross Goldstein and Mary Wagner attended a lunch-time session at the MACo conference on Wednesday August 15, 2012. The session was hosted by Delegate Jon Cardin and included a panel of election officials. The panel covered the following topics: Stuart Harvey (Frederick) spoke about early voting, David Garreis (Anne Arundel) spoke about the process of automating the delivery of absentee ballots, Margaret Jurgensen (Montgomery) spoke about the recent legislation that permits Montgomery County to conduct certain special election by mail, and Ross spoke about the Electronic Registration Information Center (ERIC), and plans for a new voting system.

Equal Employment Opportunity Commission (EEOC)

On July 31, 2012, Jared DeMarinis, in his capacity as SBE's EEOC officer, attended the first meeting of Employee Complaint Assistance Program (ECAP). The program allows interested agencies to share investigative responsibilities with other agency officers. This is particularly beneficial in cases where there are conflicts of interest that may occur in a small agency. This will allow the agencies to avoid compromising the integrity and fairness of the investigative process. The program is in the developmental phase.

3. Election Reform & Management

Online Voter Services Project Update

The online voter registration application (OLVR) went live with a soft launch on Monday, July 9th. After several weeks of use and continued analysis, the link was prominently displayed on the front page of the website and a press release was issued on August 7th.

A complete project update will be a specific agenda item.

Polling Place Accessibility

For the 2012 General Election, 99.66% of the State's polling places and early voting centers are accessible. The six polling places that are not accessible are typically older buildings, and the reasons they are not accessible generally pertain to the building's structure. Examples include buildings with corridors or doorways that are too narrow to meet ADA specifications, buildings with gravel parking lots, and buildings where the walkway slope is too steep. Rick Urps will continue to work with the local boards in the counties with inaccessible polling places to find a solution to make the polling places accessible.

4. Voter Registration

Petitions

Currently, State Board staff and local boards are verifying three petitions. One U.S. Senate candidate petition, with a deadline of August 23rd and two party petitions, Libertarian and Green party, with a deadline of August 26th.

MDVOTERS

A new software release was placed into production on August 6th. Enhancements for election judges, absentee processing and report modifications were included.

The ELECTrack agency system used by the Candidacy and Campaign Finance Division has been substantially replaced by the new online system campaign finance reporting and management system (MD CRIS). However, the new online system does not address candidate filing. To efficiently meet this need, it has been determined that the candidate filing piece will be taken over by MDVOTERS. This is a logical fit, because, except for presidential candidates, all candidates have to be registered voters. Further, the candidate filing application has to be accessible for use by all LBEs. The first step in developing this functionality for MDVOTERS was the conduct of a Joint Application Design (JAD) session, which was held August 7-9th. The focus was creating candidacy filing within MDVOTERS as well as new designs for enhancing polling place data, petition updates, voter search and absentee search improvement. Participation included staff from the Candidacy and Campaign Finance, Election Management Division, and Information Technology Divisions as well as representatives from 13 LBEs.

5. Candidacy and Campaign Finance

Commission to Study Campaign Finance Laws:

The Commission held a meeting on July 16th to discuss slates and reforms to the rules regarding attribution of contributions by business entities. Currently, the attribution rules only apply to corporations, but the commission is considering applying the attribution rules to limited liability companies and other business entities. The Commission has scheduled its next meeting on August 27th. Topics will include a review of the attribution discussion, public financing and independent expenditures.

Seminars/Trainings

The Maryland Republican Party has contacted Jared DeMarinis to have him conduct a series of trainings on the new online campaign finance reporting system (MD CRIS). The first scheduled training was scheduled for August 7th but was postponed to a later date.

Filings

On August 6, 2012, the semi-annual Contribution Disclosure Form, a required filing by either a person who does business with the State involving consideration of \$100,000 or more and makes campaign contributions of \$500 or more or a person who provides lobbyist compensation and makes campaign contribution greater than \$500, was due. The Candidacy and Campaign Finance Division received over 260 disclosure forms from qualifying persons.

The deadline for a non-principal political party and petition candidates to submit their additional documents was August 6, 2012. We had six candidates for federal office who filed a Declaration of Intent to seek nomination by petition. Only one of those candidates, Rob Sobhani, filed a qualifying petition to appear on the ballot (for United States Senate).

Gaming Expansion

The Maryland Constitution, Article XIX, § 1(e) provides that the "General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State." During the 2nd Special Session of 2012, the General Assembly passed SB 1, an act establishing additional forms and expansion of commercial gaming. The Governor signed SB 1 on August 15, 2012. The bill provides the specific question to be referred to the voters on the 2012 Presidential Election ballot.

The bill also establishes additional campaign finance reporting requirements for persons who are supporting or opposing the question. Specifically, the bill requires persons supporting or opposing the question to file a statement within 48 hours of reaching certain contribution and expenditure amounts. In addition to the requirement to file the campaign finance statements, persons supporting or opposing the question are also required to file the regularly scheduled campaign finance reports.

Since the bill and the reporting requirements went into effect on August 15th (the date it was signed), the Campaign Finance Division developed and issued instructions on and a form for this new reporting requirement.

The fine for failure to report is \$1,000 per day or 10% of the expenditure or contribution. The 48 hour reporting period will continue until November 9, 2012.

6. Voting Systems

Electronic Pollbook Software Update.

SBE concluded the testing of the latest release of the electronic pollbook software and has provided this release to the LBEs. The LBEs are currently installing the software on their pollbooks and it is anticipated that installation will be complete by the first week of September. Currently, close to half of the LBEs have already completed the update of their pollbooks. *13 of 24 cos complete - Sept 7 to be finished*

Election Night Reporting

Following the successful migration of the Election Night Reporting system to a new server, the building of the website has begun. After some initial testing at SBE, there will be a test of the exporting functionality utilizing test results from the LBEs to SBE within the next couple of weeks. Additional testing closer to the November election will also take place.

Staffing

The voting system team has also been working with Cirdan, the voting system services vendor, as well as the LBEs to bring on the 24 Temporary County Support Technicians. Each LBE is assigned a technician for 10 weeks (Eight weeks prior to the election, and two weeks after). These technicians will start training shortly. In addition there will be technicians hired to assist in performing Logic and Accuracy testing, as well as election day support.

Conducting the Election Guide

Updated sections of the Conducting the Election (CTE) Guide will be released very shortly. This document details the processes for preparing for the election, conducting it, and reporting of results using the voting system and the electronic pollbook. Minor revisions were made from the 2012 Primary, as well as revamped section on post election auditing and verification.

Election Supplies

The voting system team has also been ensuring that all LBEs have the supplies and consumables necessary for the use of the equipment for the election. To this end the team has obtained paper rolls, batteries, printer ribbons, tamper tape and other items.

Voting System Security

In accordance with SBE policy, the voting system team has been changing the system's cryptographic keys prior to the election. It is anticipated that this will be complete by the end of August. *pws, etc - cert just need supervisor card*

New Voting System Review

Dominion Voting Systems provided a demonstration of their new ImageCast Evolution voting system. The system is newly certified to the Election Assistance Commission's 2005 Voluntary Voting System Standards. Dominion also provided a demonstration for organizations representing voters with disabilities. *Trained on Wed's by disabled voter from MD DLaw etc*

7. Project Management (PM) and Information Technology (IT)

Facebook and Twitter

A new Facebook and Twitter account have been established for SBE. The social media sites will offer a new way to keep the voters, the press, and other key stakeholders up-to-date with important issues surrounding the 2012 Presidential Election.

Project Management Office

Keith Ross published the *SBE Contract/Project Manager's Contract Compliance Guidelines*. The document establishes standardized procedures for SBE project and contract managers to follow, especially as it relates to payment of invoices and changes to contracts. The Guidelines also specify a schedule for internal review of contract management practices that will be conducted by Keith.

Inventory

Keith continues to work on the detailed reconciliation of the 2012 inventory between SBE and the local boards. SBE is on track to complete the inventory on-time to submit the annual inventory reports to the Department of

General Services. Keith is also leading efforts to review potential election based inventory systems that are on the market.

Help Desk

During each election period, staff uses a help desk application to manage calls and ensure that issues are being addressed or are properly escalated. The current help desk application is several years old, very cumbersome, and part of the ELECTTrack system that is slowly being phased out due to the migration to the online campaign finance system.

Accordingly, staff has been working to identify a new product for use during the 2012 Presidential General Election. Currently, staff has identified DynamicPath, a company that provides a cloud based election specific help desk (Election Ally). Staff is in the process of working with the vendor to incorporate some of the changes into their software that SBE will need. Staff will perform a test of the updated software, and if successful, SBE will enter into an agreement with DynamicPath to use its system during the general election.

Frederick County Warehouse Relocation

The Frederick County Board of Elections changed its warehouse location. SBE IT and Network Maryland (NwMD) worked closely together to install a new data communication circuit at this new warehouse location. This connection will help the county improve certain business processes, by allowing them to accomplish several tasks at the warehouse instead of having to go back to the local board office.

Service Renewal with Maryland Archives

SBE recently renewed the Memorandum of Understanding (MOU) agreement with the Maryland State Archives for Internet services, co-location services and disaster recovery site services. The MOU period began on July 1, 2012 and lasts until June 30, 2013.

MDCRIS File Format

Kurt Snyder is still working with PCC (MDCRIS Vendor) on new file format requirements. The file format allows a filer who is using another software program to upload campaign finance report information directly into MDCRIS. There have been new requirements for the file format after errors were discovered during testing. PCC is working to correct problems and issues that have been identified.

Call Center Setup

In preparation for the 2012 Presidential General Elections, SBE IT has worked closely with Verizon to have Harford County Board of Elections added to the list of counties that will be utilizing the call center during the election. Verizon offers a Customer Redirect Service (CRS) which basically forwards all incoming calls meant for the county to a number at the call center. SBE IT will be conducting a test next month to test this service for all counties affected.

Other IT Related Events

- Successfully applied Microsoft Security updates for the month of August 2012 on SBE Server Systems
- Renewed various computer hardware support warranties.
- Renewed several software support warranties.
- Conducted CJIS background check procedures for new hires across the State.
- Completed several website updates as requested.

STATE BOARD OF ELECTIONS

P.O. BOX 6486, ANNAPOLIS, MD 21401-0486 PHONE (410) 269-2840

Robert L. Walker, Chairman
Bobbie S. Mack, Vice Chairman
Rachel T. McGuckian
David J. McManus, Jr.
Charles E. Thomann



Linda H. Lamone
Administrator

Ross Goldstein
Deputy Administrator

Memorandum

TO: State Board Members

FROM: Jared DeMarinis, Director
Division of Candidacy and Campaign Finance

DATE: August 23, 2012

SUBJECT: Waiver of late filing fees

Enclosed are the waiver requests, which were submitted by campaign committees that have been assessed late filing fees. The attached Waiver Request Information Page contains an overview of each committee as well as the Administrator's recommendation to the Board.

In the past the Board has considered the following facts in determining whether just cause exists to grant a waiver.

- Administrative error of any kind on the part of the Division.
- The lateness is due to extenuating circumstances, i.e. physical illness or death in the family.
- The late report is the first late report and contains minimal financial activity.
- The fee will cause undue financial hardship
- Computer problems occurred which made timely filing impossible. However, the filer still must have demonstrated a good faith effort to timely file.

Prior to the meeting please review each waiver request. Note the recommendations that you may disagree with or have questions on that you would like to discuss.

§ 13-337. Relief from sanctions.

- (a) Judicial determination – A sanction may not be imposed for failure to file a campaign finance report or to pay a late filing fee if a court of competent jurisdiction finds just cause for the failure.
- (b) Administrative waiver of late filing fee. – (1) On request of a responsible officer subject to the assessment of a late filing fee and with the approval of the State Board, the State Administrator may waive the late filing fee for just cause.
 - (2) The decision of the State Administrator on a waiver request shall be in writing and state the circumstances surrounding the late filing and the reasons for the decision.
 - (3) The State Administrator may make a decision on a waiver request without notice or hearing.

Please feel free to contact me at 410-269-2853 if you have any questions.

Board Meeting 8/23/12

1. Baltimore County Fire Fighters PAC
2. Barnes, Robert Citizens for
3. Brightman, Donna Citizens for
4. Osei, Christine Friends of
5. Smith, Derrick Citizens to Elect
6. Worcester County Republican CC
7. Young Democrats of Maryland



**BOARD OF ELECTIONS
FOR ST. MARY'S COUNTY**

P. O. BOX 197
41650 TUDOR HALL ROAD • LEONARDTOWN, MARYLAND 20650
Telephone: 301-475-7844 ext. 1610 • Fax: 301-475-4077

RECEIVED

AUG 14 2012

STATE BOARD OF ELECTIONS

To: Ross Goldstein

Dt: 08/08/2012

Fr: Wendy Adkins, Director St. Mary's County Board of Elections

Re: Polling Place Change for the 2012 General Election

The St. Mary's County Board of Elections office will need to change a location of a polling place for the 2012 Presidential General Election.

Precinct 06-02 Oakville Elementary School was temporarily moved to Hollywood Elementary School for the Presidential Primary Election due to construction. The construction is now complete so we will need to move precinct 06-02 back to Oakville Elementary School.

The Board has approved this location move on September 7, 2011



KEVIN KAMENETZ
County Executive

KATIE A. BROWN, Director
Board of Elections

August 14, 2012

Ms. Linda H. Lamone
State Administrator of Elections
Maryland State Board of Elections
151 West Street, Suite 200
Annapolis, Maryland 21401

**RE: Emergency Precinct Change
Baltimore County
Election District 09, Precinct 13 and 14**

Dear Ms. Lamone: *Linda*

I write to you today to request an emergency relocation for two of our precincts. The current location – Stoneleigh Elementary, a dual polling location – is under construction and will not be completed in time for the General Election.

We have secured two other sites in current polling locations to house the precincts; Towson High School for 09-13 and Dumbarton Elementary School for 09-14.

I understand changing a polling place location mid-stream during an election cycle may create problems for voters. In this light, signage will be placed at Stoneleigh Elementary to redirect voters to the temporary polling locations.

Thank you very much for your time and attention to this important issue. Should you have questions or require additional information, please do not hesitate to contact me. I look forward to hearing from you.

Respectfully,

Katie A. Brown
Katie A. Brown
Director

KAB/rml

cc: Baltimore County Election Board

OFFICE OF THE ATTORNEY GENERAL
Opinions & Advice Office
200 Saint Paul Pl., 20th Floor
Baltimore, MD 21202
(410) 576-6327

Confidential Attorney-Client Privileged

August 23, 2012

MEMORANDUM

TO: Members of the State Board of Elections
FROM: Jeffrey L. Darsie
RE: State Board Approval of Absentee Ballot Applications

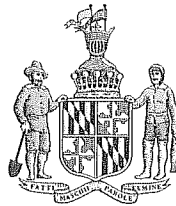
The Attorney General's opinion being issued today approves use of the State Board's proposed ballot-marking wizard without voting system certification. The opinion mentions, but does not decide, the related issue of the State Board's authority to deliver absentee ballots electronically to non-UOCAVA voters, including domestic absentee voters with disabilities.¹ This issue is relevant to the State Board's decision whether to approve an absentee ballot application form that offers electronic delivery of ballots to voters with disabilities, or the application form that offers this option only to UOCAVA voters.

In my opinion, the State Board has *very likely not* been delegated authority by the General Assembly to transmit ballots electronically to non-UOCAVA voters, including to voters with disabilities. Title 9, subtitle 3 of the Election Law Article ("EL"), Md. Code Ann., includes specific directions on delivery of ballots to absentee voters and clearly contemplates use of envelopes and specially printed ballot cards for absentee voters. *See, e.g.*, EL §§ 9-306(b)(2), 9-307, 9-310; *see also* EL §§ 9-207, 9-215 (regarding ballot printing). The State Board's authority to deliver ballots by fax, email, or online through a website may be implied only with respect to UOCAVA voters and directly in consequence of federal law.

¹ "UOCAVA" or "non-UOCAVA" voters refers to absentee voters covered or not covered by the Uniformed and Overseas Civilian Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff to 1973ff-6 ("UOCAVA"), as amended by the 2009 Military and Overseas Voter Empowerment ("MOVE") Act. The MOVE Act amendments included a requirement that states offer UOCAVA voters a choice to receive their absentee ballots via electronic transmission. *See* 42 U.S.C. § 1973ff-1(a)(7).

This conclusion is different from the advice I had previously given in a confidential memorandum of January 28, 2010. Objections raised to use of the ballot wizard resulted in a re-examination of this issue and as a result I no longer believe that electronic delivery of ballots would be regarded as the equivalent of mail delivery. It remains my opinion that a Court would be unlikely to reject voted absentee ballots solely because they were delivered by an unauthorized method, but to the extent that memo concludes that a Court would also find that SBE has authority to deliver ballots electronically, I now disavow that conclusion. Rather, as stated in my January 2010 memo, "the OAG has recommended that the State Board pursue legislation that would specifically authorize [this practice] for domestic absentee voters."

DOUGLAS F. GANSLER
Attorney General



KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

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OFFICE OF THE ATTORNEY GENERAL

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August 23, 2012

The Hon. Edward J. Kasemeyer
Miller Senate Office Building
11 Bladen Street, Suite 3W
Annapolis, Maryland 21401

Dear Senator Kasemeyer:

The State Board of Elections ("SBE" or "State Board"), working under a U.S. Department of Defense grant, is developing a ballot-marking technology to be used with SBE's online ballot-delivery system for certain absentee voters. SBE proposes to make the technology available to military and overseas civilian voters who are covered by the Uniformed and Overseas Civilian Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff to 1973ff-6 ("UOCAVA"),¹ and who choose to receive their ballots by electronic transmission, as well as to domestic absentee voters with disabilities for whom the technology is needed to vote privately and independently. You have asked for our opinion on whether SBE may implement the ballot-marking technology without first certifying it under a State law requiring the certification of "voting systems." See Md. Code Ann., Election Law ("EL") § 9-102.

97 Opinions of the Attorney General (2012)

¹ UOCAVA applies to an "absent uniformed services voter" and to an "overseas voter." See 42 U.S.C. § 1973ff-6. In the first category are active duty members of a uniformed service or the merchant marine, or their spouses or dependents, who by reason of the member's duty are absent from the place of residence where the service member or spouse or dependent is otherwise qualified to vote. *Id.*, § 1973ff-6(1). The second category includes an "absent uniformed services voter" whose active duty takes the voter overseas, as well as certain U.S. citizens residing outside the United States. *Id.*, § 1973ff-6(5).

It is our opinion that the State Board may implement the ballot-marking wizard for military and overseas civilian voters without obtaining certification under § 9-102.² As explained below, the evaluation and certification process prescribed in § 9-102 expressly applies to a “voting system,” which is defined by statute as “a method for casting and tabulating ballots or votes.” EL § 1-101(xx); *see also* COMAR 33.09.01.01B(4)(a) (defining “voting system” as “all or any component of any system for casting and tabulating ballots or votes”). The proposed technology—commonly referred to as a ballot-marking “wizard”—allows voters to mark selections electronically on a downloadable ballot before it is printed, but it does not include a capability either to “cast” or “tabulate” votes. The ballot wizard, therefore, does not itself meet the definition of “voting system.” Nor, in our opinion, does the ballot wizard modify a voting system such that certification would be required under § 9-102. Although the ballot-marking wizard performs a function that is part of the voting process for the absentee voters who opt to use it, it does not interface or interact with the State’s certified optical-scan voting system. The statute does not unambiguously extend to stand-alone voting devices that, like the ballot-marking wizard, do not interact with the voting system that records and tabulates votes.

Maryland law does not require any specific evaluation process for a stand-alone device that is not part of the voting system. Certification under a voluntary federal program, which Maryland law has made mandatory for voting systems, is not available for an online ballot-marking tool regardless of whether it qualifies as a “voting system” under Maryland law. Accordingly, an interpretation of § 9-102 that would require certification of the ballot tool as a “voting system” is not a matter of more, versus less, testing, or of applying a higher performance standard in preference to a lower one. Instead, the real consequence of that interpretation would be to prohibit use of the ballot wizard altogether, regardless of its performance or potential benefit to overseas military and absentee voters.

Ballot-marking tools similar to that being developed by SBE will be available to absentee voters in other states and to Maryland military and overseas voters using the Federal Write-In Absentee Ballot. Because we do not see that Maryland law plainly requires a different result, we believe that a reviewing court would defer to the State Board’s reasonable interpretation of the law and regulations it administers and uphold the SBE’s decision that the ballot wizard may be used for overseas military and absentee voters without certification under § 9-102.³

² Unless otherwise noted, all statutory references refer to the current version of the Election Law Article reflected in the 2010 Replacement Volume of the Annotated Code of Maryland and the 2012 Cumulative Supplement.

³ Our conclusion that certification of the proposed ballot wizard is not mandated by § 9-102 applies also to its proposed use to assist voters with disabilities to vote privately and independently. However, we note that, as to these voters, there may be other considerations

I

Background

Development of State Voting Systems Certification

The State Board and its predecessor agency, the State Administrative Board of Election Laws (“SABEL”), have for more than 40 years regulated the specifics of Maryland’s voting process. SABEL was created in 1969 at a time when mechanical-lever voting machines were required statewide for voting in polling places, *see* 1955 Md. Laws, ch. 701, with paper ballots allowed under certain conditions. *See, e.g.*, former Article 33, § 14-1 (1971 Repl. Vol.). Detailed statutes in the Maryland Code specified the capabilities and functionality that all voting machines were required to demonstrate, but State law included no provision for a central certifying authority or a program to evaluate specific types of voting machines. *See id.*, § 16-3.

SABEL was first given central certifying authority in 1975, when electronic voting system technology was introduced in Montgomery County in the form of electronically tabulated punch-card ballots. The county’s acquisition of a punch-card system was made contingent on SABEL’s approval of the “particular voting system,” including “the form of ballot arrangement, the nature of the punch card used, the method of marking ballots, and any sorting or counting devices. . . .” 1975 Md. Laws, ch. 877, § 2 (codified at former Article 33, § 16A-1 (1976 Repl. Vol.)). Because a punch-card system does not operate in the same way as a mechanical lever system, many Code provisions regulating the lever machines were unsuited to the new system. For this reason, presumably, the General Assembly also directed SABEL to promulgate rules and regulations governing the use of the new punch-card system, including procedures for using the system in polling places on Election Day and canvassing votes following the election. *Id.*, § 16A-1(d).⁴

unrelated either to the ballot-marking tool or State certification requirements that may limit the State Board’s ability to offer the device to non-UOCAVA voters. Specifically, there is a question whether State law alone would authorize the electronic transmission of absentee ballots to non-UOCAVA voters, or whether other State or federal law relating to voters with disabilities would support that practice. These separate and very different issues are beyond the scope of your question regarding certification of the ballot wizard and so we do not address them in this opinion.

⁴ “‘Canvass’ means the entire process of vote tallying, vote tabulation, and vote verification or audit, culminating in the production and certification of the official election results.” EL § 11-101(c)(1). In the context of absentee voting, “the ‘canvass’ includes the opening of any envelope accompanying an absentee ballot and the assembly and review of absentee ballots in preparation for vote tallying.” EL § 11-101(c)(2); *see also* COMAR 33.11.04 (absentee ballot canvass procedures), .05 (grounds for rejecting ballots).

SABEL's role in approving new voting systems was expanded in 1978, when State certification became a precondition of the acquisition and use of new voting systems by all local boards of elections. 1978 Md. Laws, ch. 347. The same legislation included for the first time a definition of "voting system," which was defined as "a method of casting and tabulating ballots or votes." *Id.* (codified at former Article 33, § 1-1(a)(19) (1983 Repl. Vol.)). This definition has remained unchanged since 1978. *Compare id. with* EL § 1-101(xx).

The initial standards for voting system certification gave SABEL broad discretion to decide what kind of evaluation to conduct and what level of system performance to demand. For example, the 1978 statute required only that SABEL "assure that elections are conducted with equipment best designed to (1) protect the secrecy of the ballot; (2) protect the security of the voting process; (3) count and record all votes accurately; and (4) protect all other rights of voters and candidates." Former Article 33, § 16B-2(a) (1983 Repl. Vol.). These basic standards have been retained in current law, though others have been added.⁵

In 1998, the General Assembly undertook a reorganization and revision of Article 33 in accordance with the recommendations of the Commission to Revise the Election Code. 1998 Md. Laws, ch. 585 (then codified at former Article 33, § 9-102(d) (1997 Repl. Vol., 1998 Supp.)). SABEL was replaced by the newly created State Board of Elections, which was given enhanced supervisory authority with respect to the local boards of election and "all persons involved in the elections process." *Id.*, § 2-102(a). Additionally, the State Board was charged with a duty to "maximize the use of technology in election administration, including the development of a plan for a comprehensive computerized elections management system." *Id.*, § 2-102(b)(7). The 1998 Act also added to the State's certification program the requirement that voting systems be evaluated against voluntary federal standards.⁶ *Id.*, § 9-102(c)(2).

Although the 1998 Act enhanced the State's Board's authority in some respects, it did not

⁵ In addition to these general performance standards, the statute set forth a nonexclusive list of factors that SABEL was to consider in deciding whether to approve a particular system, including the commercial availability of the system and its components and replacement parts, the efficiency of the system, the likelihood of mechanical breakdown, its ease of use and convenience for the voter, the timeliness of its tabulation and reporting of election returns, the potential for verifying the vote count, and the cost of implementation. Former Article 33, § 16B-2(b)(2) (1983 Repl. Vol.). These factors have been carried forward into current law, in substantially the same form, as "considerations" for certification. *See* EL § 9-102(e); *see also infra* note 10.

⁶ The Act included as a standard for certification that the voting system has been: "(i) examined by an independent testing laboratory that is approved by the National Association of State Election Directors; and (ii) shown by the testing laboratory to meet the performance and test standards for electronic voting systems established by the Federal Election Commission." Former Article 33, § 9-102(c)(2)(i)-(ii) (1997 Repl. Vol., 1998 Supp.).

require the statewide use of a single voting system, with the result that, as of 2000, voters in Maryland were using at least four different technologies to record and tabulate their votes, as well as a number of different models for each type of voting system.⁷ After the 2000 presidential election, and the problems revealed by the Florida recount and other voting system issues nationally,⁸ Governor Glendening created a Special Committee on Voting Systems and Election Procedures to make recommendations on how to improve the voting systems technology used in Maryland. Executive Order 01.01.2000.25. Legislation enacted the following session directed the State Board, in consultation with the local boards of election, to select a uniform statewide voting system for use in polling places and a system for use in canvassing absentee ballots. 2001 Md. Laws, ch. 564. The statute also added a requirement that the voting system be capable of creating a paper record of votes cast in the event of a recount and included provisions regarding the allocation of costs to acquire and operate the voting system as between the counties and the State. *Id.* SBE implemented the statewide procurement in phases, beginning in 2001 with requests for proposals to supply four counties with a direct-recording electronic voting system for use in polling places and an optical-scan system for absentee voting. By 2006, these two systems had been acquired and deployed statewide.

Maryland's Current Voting Systems Requirements

The current version of § 9-101(b) of the Election Law Article requires that “[t]he State Board, in consultation with the local boards, shall select and certify a voting system for voting in polling places and a voting system for absentee voting.” The voting system now certified for absentee voting is the Model ES-2000 optical-scan system. *See, e.g.*, COMAR 33.10.11 (Voting System Requirements and Procedures for the Model ES-2000). An optical-scan voting system like the ES-2000 is a paper-based voting system that “records votes, counts votes, and produces a

⁷ For the 2000 presidential elections, four different types of voting systems and six different models were in use at polling places in Maryland. Montgomery County used a punch-card system; Baltimore City a direct-recording electronic system; Allegany, Dorchester, and Prince George’s Counties mechanical lever machines; and, in nineteen counties, three different models of optical scan systems. *See, e.g.*, Department of Legislative Services, Office of Policy Analysis, “Review of Election Administration in Maryland,” at 25-26 (Nov. 2001). For absentee voters, Montgomery and Allegany Counties used a punch-card system; Dorchester County used paper ballots; and Baltimore City and the twenty remaining counties used one of six different models of optical scan systems, from three different vendors. *See* Special Committee on Voting Systems and Election Procedures in Maryland, “Report and Recommendations,” at 110-11 (Feb. 2001).

⁸ *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (“This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”).

tabulation of the vote count from votes cast on paper cards or sheets.” 2005 Voluntary Voting System Guidelines, Vol. I, ¶ 1.5.2.1 (p. 10).⁹

Under § 9-102(c) of the Election Law Article, the State Board has a duty to “periodically review and evaluate alternative voting systems” for certification. State Board regulations governing the State certification program provide, “[t]he vendor of a voting system may apply to the State Board for evaluation and certification of the system for use in the State.” COMAR 33.09.03.02A. The vendor is required to identify the voting system by “specify[ing] clearly the specific equipment, hardware, firmware, and software for which certification is sought.” *Id.*, 33.09.03.02B(1).

Section 9-102(d) sets out the standards that the State Board must apply when reviewing a voting system for certification:

The State Board may not certify a voting system unless the State Board determines that:

(1) the voting system will:

- (i) protect the secrecy of the ballot;
- (ii) protect the security of the voting process;
- (iii) count and record all votes accurately;
- (iv) accommodate any ballot used under this article;
- (v) protect all other rights of voters and candidates;
- (vi) be capable of creating a paper record of all votes cast in order that an audit trail is available in the event of a recount, including a manual recount; and
- (vii) provide a voter-verifiable paper record . . . ;

⁹ The 2005 Voluntary Voting System Guidelines are “a set of federally developed specifications and requirements against which voting systems can be tested to determine if the systems provide all of the basic functionality, accessibility and security capabilities required of these systems.” Election Assistance Commission, “Voluntary Voting System Guidelines,” available at http://www.eac.gov/testing_and_certification/voluntary_voting_system_guidelines.aspx (last visited Aug. 16, 2012). The 2005 guidelines are the third iteration of voluntary federal standards and were developed by the Election Assistance Commission pursuant to the Help America Vote Act. *Id.* The 2005 guidelines include accessibility standards, which the General Assembly has adopted under certain circumstances. *See, e.g.*, EL § 9-102(f)(3) and (h)(1). Previous versions of the voluntary federal standards were developed by the Federal Election Commission and issued as “voting system standards” in 1990 and 2002.

(2) the voting system has been:

- (i) examined by an independent testing laboratory that is approved by the U.S. Election Assistance Commission; and
- (ii) shown by the testing laboratory to meet the performance and test standards for electronic voting systems established by the Federal Election Commission or the U.S. Election Assistance Commission; and

(3) the public interest will be served by the certification of the voting system.

EL § 9-102(d).¹⁰ Additionally, the statute requires SBE to evaluate a voting system for compliance with the requirements of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213, and the Help America Vote Act, 42 U.S.C. §§ 15301 to 15545. *See* EL § 9-102(f) through (h). In general, the standards contained in § 9-102 allow SBE considerable discretion to decide what sort of evaluation is appropriate and what level of performance will be deemed acceptable. The notable exception is the requirement in subsection (d)(2), which makes conformance testing by an accredited laboratory to federal voting system standards a necessary precondition to State certification.

Provisions of Federal Law Relating to Voting Systems

The Help America Vote Act of 2002 (“HAVA”) was the federal response to the widespread dissatisfaction with voting system performance in the 2000 presidential elections. That legislation required states to upgrade their voting systems to meet certain minimum requirements, provided federal grants for that purpose, and created the U.S. Election Assistance Commission (“EAC”) to administer the grant program and to provide technical guidance to help states comply with the Act. The federal minimum standards imposed by HAVA apply to all voting systems used in federal elections. These standards include certain requirements regarding “overvotes,”¹¹ auditing of election results, and accessibility for persons with disabilities. *See* 42

¹⁰ In addition to these performance or system-capability standards, the statute also directs the State Board to consider other factors in making its certification decision, including the commercial availability of the system, cost of implementation, likelihood of malfunction, efficiency of the system, convenience and ease of understanding for the voter, timeliness of tabulating and reporting of election returns, the accessibility of the system for voters with disabilities, and “any other factor that the State Board considers relevant.” EL § 9-102(e).

¹¹ An “overvote” occurs when one votes for more than the maximum number of selections allowed in a contest. A HAVA-compliant voting system that is used in polling places must notify voters of overvotes and the consequences of overvoting and afford voters the opportunity to correct overvotes and verify or change their selections before the ballot is cast. 42 U.S.C. § 15481(a)(1)(A). An exception is made for paper ballot voting systems, punch card voting

U.S.C. § 15481(a).

HAVA defines a “voting system” to mean:

- (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
 - (A) to define ballots;
 - (B) to cast and count votes;
 - (C) to report or display election results; and
 - (D) to maintain and produce any audit trail information; and
- (2) the practices and associated documentation used—
 - (A) to identify system components and versions of such components;
 - (B) to test the system during its development and maintenance;
 - (C) to maintain records of system errors and defects;
 - (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
 - (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

42 U.S.C. § 15481(b). HAVA’s broad definition of a voting system is directly relevant to voting systems in all states for purposes of state compliance with its requirements as to overvotes, auditing capability, and accessibility standards. However, the statute does not impose testing or certification requirements on any state, even for the limited purpose of determining whether a state’s voting system is HAVA-compliant.¹²

systems, or central count voting systems—including a central count system for mail-in absentee ballots—which may meet the foregoing requirements by establishing a voter education program about the effect of overvoting and giving instructions on how to correct errors with a replacement ballot. 42 U.S.C. § 15481(a)(1)(B)(i)-(iii).

¹² Because the EAC certification program uses the HAVA definition of “voting system,” *see* 2005 Voluntary Voting System Guidelines, Vol. I, p. A-19, that definition also serves to identify what functions should be reviewable under the voluntary federal certification program. However, apart from the capability to “cast and count votes,” none of the other functions in the HAVA definition are expressly referenced in Maryland’s definition, though some of them (such

Section 202 of HAVA directs the EAC to adopt voluntary voting system guidelines, and to provide for the testing and certification of voting system hardware and software. 42 U.S.C. § 15371(a). The guidelines provide a baseline against which voting systems can be tested. *See supra*, n.9. EAC certification, in turn, gives an assurance that a voting system, if deployed and operated correctly, will perform to this standard. However, conformance testing under the EAC program is purely voluntary for the states, as is the selection of which voting system guidelines, if any, a state's voting system should meet. Neither HAVA nor any other federal law mandates the testing or certification of voting systems.

The EAC certification program is limited in other respects as well. Most importantly for our purposes, EAC certification is not available for individual components of a voting system. Rather, the manufacturer submits an entire voting *system* for certification and identifies the various specific configurations of system components that it wishes to certify. *See, e.g.*, EAC, "Voting System Testing and Certification Program Manual," v.1.0, at 18 (eff. June 1, 2011) ("An EAC certification is an official recognition that a voting system (in a specific configuration or configurations) has been tested to and has met an identified set of Federal voting standards."). Although federal voting system guidelines do include testing standards for different parts or subsystems of a voting system and for testing interfaces between components, the certification attests only to the overall performance of the specific configuration or configurations that the manufacturer submits. *See, e.g.*, 2005 Voluntary Voting System Guidelines at 7 ("The certification number applies to the system as a whole and does not apply to individual system components or untested configurations."). And because the EAC only certifies voting *systems*, it is effectively limited to private manufacturers, inasmuch as governments typically do not design and manufacture entire voting systems.

Military and Overseas Absentee Voters

Federal law mandates certain actions by the states to facilitate absentee voting opportunities for military personnel and overseas civilian voters. In 2009, Congress passed the Military and Overseas Voter Empowerment ("MOVE") Act, which amended UOCAVA to require, among other things, that states provide a method for transmitting blank absentee ballots to UOCAVA voters electronically and by mail for any election for federal office, 42 U.S.C. § 1973ff-1(a)(7), and allow those voters to designate which transmission method they would prefer. *Id.*, § 1973ff-1(f)(1). "[T]o the extent practicable," each state must ensure that its transmission procedures "protect the security and integrity of absentee ballots" and that "the privacy of the identity and other personal data [of the voter] is protected throughout the process of such transmission." *Id.*, § 1973ff-1(f)(3).

as reporting of election results and creation of an audit trail) are included by implication insofar as no system can be certified by the State Board without these capabilities. *See* EL § 9-102.

Consistent with this federal mandate, Maryland offers electronic transmission of blank ballots to UOCAVA voters via an online absentee-ballot-delivery system. For the 2012 general election, a UOCAVA voter requesting electronic delivery will be notified by e-mail that his or her absentee ballot is ready and will be provided a link and ballot-tracking number that gives access to the system. *See, e.g.*, Letter of Linda Lamone, Administrator, SBE, to Sen. Brian Frosh, at 2-3 (Feb. 6, 2012). From the SBE website, using the ballot-tracking number and other required information, the voter will be able to download and print a blank ballot, ballot instructions, a form containing the ballot oath, a return envelope, and other voting materials. *Id.* The completed ballot, together with the signed ballot oath, must be returned by regular mail (or by an authorized agent) to the appropriate local board of elections for review, inspection, and tabulation during the absentee ballot canvass. *See generally* COMAR 33.11.04.

A paper ballot that is printed and returned by the absentee voter cannot be read by the optical-scan voting system, which requires heavier paper and printed “timing marks” to allow the scanner to read and record the voter’s selections. As a result, a bipartisan duplication team must copy, by hand, the voting selections marked on the paper ballot onto a scan-ready ballot card. *See* COMAR 33.11.04.08; *see also* EL § 9-303(b)(8) (requiring guidelines on absentee voting to include “review of voted ballots and envelopes for compliance with the law and for machine tabulation acceptability”). This “duplicate” ballot is then fed into the optical scanner where the votes are recorded and tabulated.

The Proposed Ballot-Marking Wizard

The ballot-marking wizard at issue here is being developed for the Federal Voting Assistance Program (“FVAP”), a unit within the Department of Defense that was established to assist uniformed services personnel and overseas civilians in exercising their right to vote in federal elections. *See generally* R. Michael Alvarez, *et al.*, “Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem,” 34 *Fordham Urb. L.J.* 935 (April, 2007). The FVAP solicited grant proposals under 10 U.S.C. § 2358 to develop and implement technologies to make voting more accessible for UOCAVA voters. *See* 10 U.S.C. § 2358(a)(2)(B) (authorizing the Secretary of Defense to engage in research and development projects of “potential interest to the Department of Defense”). In 2011, SBE applied for and received a grant of \$653,719 to develop an online voter-registration system for use by UOCAVA voters and to make certain enhancements to the State’s online ballot-delivery system, including the development of a ballot-marking wizard. *See* “DoD Awards Grants for State & Local Military/Overseas Voting Systems” (Nov. 3, 2011), *available at* <http://www.fvap.gov/global/news/2011news/nr29-2011.html> (last visited Aug. 14, 2012); *see also* Maryland State Board of Elections, Technical Proposal, “Online Voter Registration & Ballot Marking and Counting: An Adaptable and Open Source Solution” (“Grant Proposal”), at 3, *available at* <http://www.fvap.gov/resources/media/maryland.pdf> (last visited Aug. 21, 2012).

Under the current process, absentee voters receive their ballots by mail, fill them out by hand, and return them by mail. As described in SBE’s Grant Proposal, the ballot wizard would

give military and overseas civilian voters the option to download the ballot from the SBA's website, make voting selections on the voter's computer, review a summary screen showing those selections, and print out a ballot with the selections marked. Grant Proposal at 7. The wizard would notify the voter of any overvote or undervote and give her the opportunity to correct her ballot accordingly. *Id.* The wizard would also generate and print onto the ballot a barcode encapsulating the voter's selections. *Id.* at 8-9. After the voter returns her completed, canvassers scan the barcode to generate a duplicate ballot, as opposed to duplicating the ballot by hand, as is the current practice. *Id.* at 7-9. The Grant Proposal explains the expected benefits of the ballot wizard and barcode:

This wizard will improve the accuracy and readability of the voter's voted ballot as it will be designed to prevent overvotes and other voter errors, decrease the likelihood that an election official has to determine the intent of the voter, and increase voter satisfaction with the voting process. These benefits will lead to increased ballot return and acceptance rates.

* * *

[The barcode] has two significant benefits over the current process of manually duplicating ballots. First, it serves an important safeguard during the canvassing process and improves the accuracy of the counting process by reducing the risk of transcription errors when manually duplicating a ballot. It also improves the efficiency of the canvasses conducted by local election officials by replacing a manual process with a primarily automated process with a manual verification.

Grant Proposal at 7, 9. A further goal of the proposal was to create a "generic, system neutral interface" that could be easily adapted to different voting or election systems and easily shared with other jurisdictions. *Id.* at 4.

II

Analysis

Whether the certification requirements of § 9-102 of the Election Law Article extend to the State Board's proposed use of a ballot-marking wizard is, at its heart, an issue of statutory construction. In construing a statute, the "cardinal rule" is to ascertain and give effect to the actual intent of the Legislature. *Gardner v. State*, 420 Md. 1, 8 (2011). The starting point in this analysis is to consider the ordinary, plain meaning of the statutory language. *Id.* If this language is unambiguous and consistent with the apparent purpose of the statutory scheme, the inquiry into legislative intent is normally at an end. *Id.* A court interpreting a statute will "neither add

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nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute” and will not “construe a statute with forced or subtle interpretations that limit or extend its application.” *Id.*, 420 Md. at 8-9 (internal quotation marks omitted).

According to its plain language, § 9-102 applies to a voting system, the characteristics and overall performance of which must, for certification, meet certain statutory criteria. “Voting system” is elsewhere defined as “a method for casting and tabulating ballots or votes.” EL § 1-101(xx). We believe the General Assembly, by its use of the term “method,” meant to cover any technological approach to the job of “casting and tabulating” votes, whether it be based on punch-cards, optical-scans, or any other type of platform that would later be developed. This reading is confirmed by the historical development of the State certification program, where State-level certification began as a legislative response to the problem of managing the use in different counties of new and various voting system technologies in place of the comparative uniformity that had existed previously, when all counties used mechanical-lever systems in accordance with the rules set out in the Maryland Code.

Given this apparent purpose to include the complete array of developing technologies, it is unremarkable that neither the definition of “voting system,” nor the certification statute itself, undertakes to list the particular functions or components that must be included in a voting system. The multiplicity of voting systems in place at the time would have made it exceedingly difficult to identify which components are necessarily embraced by the term “voting system.” Instead, the State definition identifies a voting system only with regard to the core functions that would be expected of any technology used to conduct an election: the casting and tabulating of votes.

In practice, the specification of which components are considered part of the voting system is a responsibility of the manufacturer that requests State or EAC certification because certification attaches only to the particular configuration of hardware and software that the manufacturer or vendor submits for testing. *See, e.g.*, COMAR 33.09.03.02 (vendor’s application must specify the equipment, software, and firmware for which certification is sought). No form of certification is available for an isolated, stand-alone device that is something less than a voting system. In addition, a separable system component does not receive any approval for use except in the precise configuration of an entire system in which it has been tested. Any device or component, if removed from the tested configuration, is not “certified.” In short, the only type of certification available under § 9-102 is for the entire voting system operating *as a system*.

The legislative intent to create an evaluation process reserved for complete voting systems is reflected in the capabilities, performance standards, and other considerations contained in the statute, which are all exclusively system-level requirements. *See* EL § 9-102(d). The performance of individual components or subsystems is not even addressed by § 9-102. Accordingly, we can discern in § 9-102 no intent to require certification for any particular device—including a ballot-marking device—except insofar as the device may itself qualify as a

voting system or be used as a component in a voting system.¹³ Consistent with this understanding of the basic scope of § 9-102, we consider each of these possibilities in turn.

A. *The Ballot-Marking Wizard is Not a Voting System*

The ballot-marking wizard does not in our view perform either of the core functions of a voting system under Maryland law: the “casting or tabulating” of votes. “Cast,” in the voting sense, means “[t]o formally deposit (a ballot) or signal one’s choice (in a vote),” Black’s Law Dictionary 246 (9th ed. 2009), or “to deposit (a ballot) formally or officially[.]” *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 92 (S. Ct. Haw. 1997) (quoting Webster’s New Int’l Dictionary (2d ed. 1959)). Even in its more common meaning, the word “cast” connotes motion. Merriam Webster’s Collegiate Dictionary (10th ed. 1993) (“to cause to move or send forth by throwing”). Although dictionary definitions do not resolve the interpretive issue before us, we believe that, on balance, they marginally favor a reading of “casting” that is focused on the process of *submitting* the ballot or vote for recordation and not the process of *marking* the ballot.

In some contexts, the difference between marking selections on a ballot and casting a ballot is clearly delineated. HAVA, for example, requires that voters be afforded an opportunity to “verify . . . the votes selected” and correct any errors *before* the ballot is “cast and counted.” 42 U.S.C. § 15481(a)(1)(A)(i); *see also* 2005 Voluntary Voting System Guidelines at A-19 (defining “voted ballot” as a “ballot that contains all of a voter’s selections and has been cast”). In the context of absentee voting, courts have even more clearly delineated the distinction between marking one’s selections on a ballot and “casting” a ballot or vote. *See, e.g., Maddox v. Board of State Canvassers* 149 P.2d 112, 115 (Mont. 1944) (observing that under Montana election law “[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot” and “[i]t is not the marking but the depositing of the ballot in the custody of the election officials which constitutes casting the ballot or vote”); *see also Wakulla County Absentee Voter Intervenors v. Flack*, 419 So.2d 1124, 1126 (Fla. App. 1982) (noting that all absentee votes were “cast” in the election supervisor’s office for purposes of statute allowing absentees to request assistance).

The term “casting” is also frequently used to encompass both the marking *and* the depositing of the ballot, as when, for example, a voter’s right to privately cast a ballot is invoked. *See, e.g.,* EL § 9-102(f)(2) (voting system shall ensure private casting of votes by persons with

¹³ Federal law reflects a similar understanding that the word “system” implies some level of integration or common operation. For example, the 2005 federal guidelines define an “electronic voting system” to be “one or more *integrated* devices that utilize an electronic component for one or more of the following functions: ballot presentation, vote capture, vote recording, and tabulation. . . .” Voluntary Voting System Guidelines, Appendix A: Glossary, at A-10 (defining “electronic voting system,” (emphasis added)), *available at* <http://www.nist.gov/itl/vote/upload/VVSG-Volume-IAppendixA.pdf> (last visited Aug. 16, 2012).

disabilities); *see also State ex rel. Stokes v. Brunner*, 898 N.E. 2d 23, 28 (Ohio 2008) (noting that “electors who deposit their absentee ballots at a polling location during the absentee-voting period have cast their ballots under the plain language of [Ohio observer statute] by marking them and formally depositing them”). But while “casting” is sometimes shorthand for both actions together, marking a ballot without officially submitting it for counting does not, by itself, amount to “casting” a ballot or vote. Marking is precisely what the proposed ballot wizard does, and no more.

The difference between the vote recording and tabulating that a voting system performs and the ballot marking that a UOCAVA voter performs through the use of the wizard is not merely linguistic; marking selections on an absentee ballot and officially recording one’s vote are distinct processes. The proposed ballot wizard lacks any capability for sending, receiving, or officially recording voted ballots. Nor does the online ballot-delivery system enable voters to submit their ballots electronically for direct tabulation by another device or system. A technology that included either of these two abilities might well bridge the gap between the two processes and thereby constitute a method for casting a ballot or vote. But the ballot wizard does neither. Voters using the online wizard can only cast their ballots in the same way that all other absentee voters do, by mailing the ballot to the appropriate local election board.

The fact that the ballot wizard generates a barcode that captures the voter’s selections does not alter our conclusion. The sole purpose of the barcode is to ease the process of ballot duplication that occurs during the canvassing process. Instead of the current system of hand-marking the absentee’s selections onto the ballot card so that it can be fed into the optical-scan system, election workers handling a paper ballot marked with the wizard will scan the barcode to automatically generate the duplicate ballot card. But using either method to mark the downloaded ballot, the duplicate card is checked against the visible marks the voter made on the paper ballot, which remains the official record of his or her vote. If the ballot generated from the barcode does not match the visible record the voter has marked on the original paper she has submitted—where, for example, a voter using the ballot wizard later uses a pen to change her selection after printing the ballot—the visible record is used to create the duplicate and the barcode is disregarded. In this respect, the barcode is but a scrivener’s tool, an administrative convenience for streamlining and regularizing the intermediate process of copying the absentee voter’s choices into a system-readable format. At no point does the use of the barcode affect either the voter’s selections or the voting system itself.

The conclusion that a ballot wizard is not a “voting system” is generally consistent with the way others, including the EAC, regard the technology. In response to a question from the State Administrator of Elections on how the EAC would view ballot-marking wizards for certification purposes, the EAC’s Testing Director wrote: “Web applications, such as on-line ballot marking wizards, do not meet the definition of a voting system as defined in the V[oluntary] V[oting] S[ystem] G[uidelines] and therefore are not considered eligible for testing and certification under the EAC program.” Memorandum of Brian Hancock, Director, EAC

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Testing and Certification Division, to Linda Lamone, Administrator, SBE, at 2 (Feb. 3, 2012).¹⁴

We are aware that California's Secretary of State, interpreting California law, came to the opposite conclusion when she determined that a technology similar to SBE's ballot wizard *did* amount to a voting system. The California Secretary of State explained that "LiveBallot enables voters to use a computer to 'mark[] their ballot selections online' and thus to cast votes." *See, e.g.,* Letter of Debra Bowen, Secretary of State, California, to Bryan Finney, President, Democracy Live at 2 (October 11, 2011).

The differences between California election law and Maryland law may account for the different interpretations. Putting aside whether the ballot wizard "casts" ballots, it clearly does not "tabulat[e]" them, something Maryland's definition of "voting system" requires that California's does not. *Compare* EL § 1-101(xx) ("a method for casting *and* tabulating ballots or votes" (emphasis added)), *with* Cal. Elec. Code § 362 ("any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast *or* tabulate votes, or both" (emphasis added)). We also note that California's certification program operates in an elections environment that is very different from Maryland's. In California, every county may choose its own voting system whereas, in Maryland, the State Board selects a single statewide system that must be used "in all counties." EL § 9-101(c); *see generally* Letter of Debra Bowen, Secretary of State, California, to Bryan Finney, President, Democracy Live. Given the far greater possibility for variation in voting systems across California, it should not be surprising that election authorities there might interpret their voting system statutes more broadly in an effort to maintain some uniformity in the standards that apply to those disparate systems.

Whatever the merits of the Secretary of State's reading of the California statute, legislation has been introduced to clarify the difference between a "ballot marking system" and a "voting system," and to specify that the term "voting system" does not include the type of ballot-delivery and ballot-marking system proposed by the State Board here. *See* California Assembly Bill 1929, Third Reading (as amended June 28, 2012), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1901-1950/ab_1929_bill_20120628_amended_sen_v95.pdf (last visited Aug. 21, 2012)). The bill defines a "ballot marking system" to mean "any mechanical, electromechanical, or electronic system and its software that is used for the sole purpose of marking a ballot for a special absentee voter and is *not connected to a voting system at any time.*" *Id.* (emphasis added). The legislation prohibits a ballot-marking system from including certain capabilities (*e.g.,* the ability to store voting selections or tabulate votes) and requires the Secretary of State to establish new procedures for the review and approval of such systems. *See* California Assembly Bill 1929, Third Reading, § 5 (proposing to amend the California Elections

¹⁴ The memorandum noted that the EAC General Counsel "concur[s] with the substance" of the memorandum, although "it does not constitute an official opinion of the EAC because of the current lack of a quorum of Commissioners." Memorandum of Brian Hancock, Director, EAC Testing and Certification Division, to Linda Lamone, Administrator, SBE, at 1.

Code by adding §§ 19260 to 19275).¹⁵

A number of other jurisdictions already appear to offer ballot-marking tools to assist UOCAVA voters in completing electronically-delivered ballots. See FVAP, “Electronic Voting Systems Fact Sheet,” available at <http://www.fvap.gov/resources/media/evswfactsheet.pdf> (last visited Aug. 22, 2012). Among the states to offer ballot-marking tools are those, like Delaware, that have voting system certification requirements analogous to Maryland’s, including that a voting system used in the State must have received federal certification. See, e.g., Del. Code Ann., title 15, § 5001 (requiring certification to voluntary voting system standards for “any voting device, machine or system purchased by the State”). However, the significant differences among state voting-system laws and election-administration schemes make comparisons difficult and of relatively limited help in our analysis. Still, it seems fair to conclude that some other states have, at a minimum, viewed online absentee ballot systems as something other than a voting system. See “Written testimony in support of SB 1078” by Bob Carey, Director, Federal Voting Assistance Program, U.S. Department of Defense, at 5 (April, 2012) (“Requiring pre-certification of such an online blank ballot delivery and online marking system would make Maryland the only one of the 24 states with similar tools with such a requirement; to date, no other State has required their system pass pre-certification requirements.”). That appears to be the effect of the proposed legislation in California. We think the same conclusion follows from a comparison of the ballot wizard against Maryland’s definition of a “voting system.”

B. *The Ballot Marking Wizard Does Not Modify the ES-2000 Voting System*

For similar reasons, we conclude that the ballot wizard does not modify Maryland’s voting system such that its use would trigger the certification requirement. Maryland voters use one of two certified voting systems—a touchscreen system for voting in polling places and an optical-scan system for absentee and provisional voting. See, e.g., State Board of Elections, “Overview of Maryland’s Voting System,” available at http://www.elections.state.md.us/voting_system/index.html (last visited August 21, 2012). When used for absentee voting, the ES-2000 optical-scan system functions as a central-count system, meaning that all votes are recorded and tabulated in a central location during the absentee ballot canvass. Canvass procedures control the handling of returned ballots, COMAR 33.11.04, and determinations about whether the ballots are accepted or rejected, COMAR 33.11.05. To record and tabulate votes, election officials

¹⁵ As of August 21, 2012, AB 1929 had been ordered to a third reading in the California Senate. Like the pending California measure, Maryland legislation proposed during the 2012 General Assembly session would have expressly authorized the development of an on-line ballot-marking tool and the fax or internet transmission of ballots for military or overseas voters and voters with disabilities who request such delivery. See S.B. 1078, 2012 Gen. Assembly (third reader) (proposing to amend EL §§ 9-306(b), 9-308(c)). The Maryland bill passed third reader in the Senate but did not reach third reader in the House of Delegates before the end of the legislative session.

manually feed ballot cards into the AccuVote unit, the scanning apparatus that records and counts votes and tabulates the results. COMAR 33.10.11.01B. Thus, apart from the unit's programming, the ballot card is the only real input into the optical-scan unit.

From the State Board's description of its proposed use, the ballot wizard would never be connected to the ES-2000 system and would not interface at any point with the optical-scan unit. The configuration of the ES-2000 system would remain unchanged by the manner in which the absentee voter chooses to indicate his or her vote, whether it be by pen, pdf annotator,¹⁶ or the ballot wizard at issue here. *See, e.g.*, COMAR 33.11.05.05A(1) ("Absentee ballots may be marked by any kind of pencil or ink."). The paper ballot that is created from the ballot wizard is never introduced into the optical-scan system, but is instead separated from the vote-recording and tabulation processes by intermediate procedures needed to duplicate the voter's original ballot onto a ballot card capable of being scanned. Consequently, we can foresee no realistic scenarios in which the ballot wizard itself could affect the performance of the optical-scan system.¹⁷ For these reasons, we do not think that use of the ballot wizard would represent a modification or addition to the ES-2000 absentee system.

This is not to say that a ballot-marking wizard is never part of a voting system; it commonly is. In fact, in 2009, the State Board required certification of the polling-place use of a ballot-marking device in conjunction with the optical-scan system. At that time, State law required SBE to acquire a new polling-place system that provided a voter-verifiable paper record and met the relevant HAVA accessibility standards. 2007 Md. Laws, chs. 547, 548. If no system meeting both requirements were commercially available, a statutory contingency plan allowed for an alternative procurement. 2009 Md. Laws, ch. 428. Optical-scan systems without a ballot-marking device to assist voters with disabilities did not meet the accessibility standards. And though accessible ballot-marking devices had been developed, no optical-scan system had been certified to the Voluntary Voting System Guidelines with the ballot-marking device included as a component of the system. The question arose, therefore, whether the contingency had been met or whether the optical-scan system and the marking device together were a

¹⁶ A pdf annotator is a type of commercially available software that enables the user to electronically mark documents provided in the commonly used portable document format, or "pdf," using either a touchscreen or keyboard.

¹⁷ Commenters expressed concern about the security of the ballot wizard and the possibility that malware or other computer viruses present on the absentee voter's computer might cause the wizard to misidentify the voter's selections. It is our understanding that the State Board is aware of these concerns and is testing the wizard accordingly. Although the hypothetical possibility of technical malfunction may not be irrelevant to the interpretive decision we address here, it is an aspect of that decision that is properly left to the agency to evaluate. *See Schade v. Maryland State Bd. of Elections*, 401 Md. 1, 39 (2007) (observing that it is for the State Board, and not a reviewing court, to evaluate the need for security measures).

“commercially available” voting system, despite the lack of federal certification for that configuration of system components. *See generally* SBE Memorandum to Offerors, “Determination of Commercial Availability & Cancellation of Solicitation #D38B9200010 (May 11, 2009).

With advice from this Office, SBE concluded that certification of the ballot-marking device was required under § 9-102 and therefore no qualifying system was available. *Id.* In that situation, the ballot-marking device had to be regarded as part of the voting system for both legal and technical reasons. As a strictly legal matter, State law required a voting system that met accessibility standards. EL § 9-102(f), (g). Therefore, if the ballot-marking device was necessary for the system to meet those standards, the ballot-marking device had to be considered as part of the system for certification purposes. Moreover, from a more technical perspective, the proposed use of the ballot-marking device in polling places made it part of the voting system. Though not physically connected to the optical-scan unit, the device would mark the actual ballot cards fed into the scanning device. Accordingly, the ballot-marking device interacted with the optical-scan system to this extent and its performance and accuracy, and the quality of the marks on the ballot card would directly impact the performance of the optical-scan system.

By contrast, the ballot-marking wizard does not itself mark selections on the ballot card—the casting mechanism used by the ES-2000 system—and so does not have the same potential to modify or affect the performance of that system. Moreover, an absentee voter who has used a wizard to assist her in navigating through the various ballot choices before printing her ballot has the opportunity to review the accuracy of the marked selections at her leisure and to make any corrections she finds necessary. These important differences, in terms of system performance and accuracy, illustrate the principle that a ballot-marking tool may be considered part of a voting system if it is integrated into or connected with that system. *See, e.g.*, COMAR 33.09.01.01B(4)(b)(ii) (defining “voting system” to include a “voting machine, voting device, tabulating equipment, vote-counting program, or other equipment, hardware, firmware, or software used *by or with* a voting system” (emphasis added)). Arguably, the need for testing and certification as to these core functions would arise where the ballot-marking tool is integrated into the voting system because, once the ballot is cast in such an arrangement, the voter is completely reliant upon the voting system to record and tabulate all votes accurately. Because the State Board has determined that the ballot-marking wizard before us now is not so integrated, and the facts support its determination, we conclude that certification is not required.

C. *SBE’s Interpretation of the Statute is Reasonable*

Although the State Board has interpreted § 9-102 to apply to a ballot-marking device when that device is a component of a complete voting system, it views the proposed ballot-marking wizard as separate from, and thus not a part or component of, the certified optical-scan system. *See generally*, Letter of Linda Lamone, Administrator, SBE, to Sen. Brian Frosh (Feb. 6, 2012). Certainly, other readings are possible; the statute offers no clear rule on how to define the limits of a system, except to the extent the vendor has already done so. However, given the

statutory purpose of assuring the “security and integrity” of the various voting processes, EL § 1-201(6), the question of how to define those limits becomes more technical than legal, requiring the exercise of expertise about voting systems, their components, and how they interact with one another. As the agency that has since 1978 exercised all of the statutory duties relating to State certification of voting systems, the State Board is well suited to define what is, and is not, a “voting system” and we believe that a reviewing court would afford SBE’s interpretation of “voting system” considerable deference.

“[A]n administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight. . . .” *Thanner Enterprises, LLC v. Baltimore County*, 414 Md. 265, 275 (2010) (quoting *Maryland Aviation Administration v. Noland*, 386 Md. 556, 571 (2005)). The deference ordinarily due to an agency’s interpretation of the statute it administers “is all the more warranted when, as here, the regulation concerns ‘a complex and highly technical regulatory program,’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); see also *Thanner*, 414 Md. at 275 (observing that “the expertise of the agency in its own field should be respected”).

The conclusion that the State Board’s application of the certification provisions is entitled to deference finds support in *Schade v. Maryland State Bd. of Elections*. There, the Court of Appeals concluded that SBE’s certification of a voting system was entitled to deference because the certification decision was “a matter of policy or quasi-legislative in nature,” 401 Md. at 38, and because “the statutory requirements . . . give the State Board broad discretion to weigh various factors and ultimately decide on a system. . . .” *Id.* at 38-39. Within the context of the certification of voting systems, the State Board was “no doubt, in a better position to carry out the charge delegated to it than any other entity, including this Court.” *Id.* at 39.

In our view, a reviewing court would likely afford the State Board’s determination here—that a ballot-marking wizard neither *is* a voting system nor *modifies* a voting system—the same deference that it afforded the certification decision in *Schade*. In addition to the “broad discretion” described in *Schade*, the Legislature delegated to the State Board the interpretive responsibility to promulgate regulations construing the certification process and its applicability to voting systems. See EL § 9-102(b). We believe it incontrovertible that the State Board, and not a reviewing court, is best equipped to make the fine technical determinations as to what types of voting-related devices have a sufficiently close connection to the voting system to be subject to certification as a part thereof. Thus, just as in *Schade* the Court of Appeals observed that “it is not this Court that should ultimately decide on the State’s voting system, but the State Board, to which that power was expressly delegated,” 401 Md. at 39, we believe that the technical decision at issue here is also one that the Legislature has delegated to SBE, and SBE’s decision is therefore entitled to deference. See *76 Opinions of the Attorney General* 3, 14 (1991) (occupational licensing board “has presumed expertise and . . . responsibility” to determine specific application of statutory term, the scope of which was not clearly delineated by the

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General Assembly); 78 *Opinions of the Attorney General* 26, 32 (1993) (same).

Several commenters have expressed their disagreement with the State Board's understanding of § 9-102. In their view, when technology is used to mark ballots, it is so intertwined with the voting process that it necessarily becomes a part of the voting system. In addition, they note that the wizard performs functions that fall within the HAVA definition of "voting system" and also that there are federal guidelines that address ballot marking. Finally, they express a concern that if § 9-102 is not construed to require certification, the protection it offers to voters would be undermined.

Although we see merit in these arguments, ultimately we find that these views are not anchored in the text or design of the statute. As explained above, the State definition of "voting system" does not plainly encompass a stand-alone ballot-marking tool. Instead, that definition focuses on "casting and tabulating ballots or votes," EL § 1-101(xx), which is something the ballot-marking wizard does not do. Furthermore, the text of § 9-102 itself does not address the question of how the State Board should evaluate any particular voting-related device, except in the context of a complete voting system. The absence from § 9-102 of any provision for testing separate devices suggests that this is a case the Legislature has simply not provided for, rather than an intent to apply the statute as broadly as possible.

Nor is it warranted, in our opinion, to interpret § 9-102 in light of the federal definition of "voting system." The State definition preceded the enactment of HAVA and has not been changed subsequently to conform to the federal definition. The two definitions are also textually very different, with the State definition encompassing only the two core functions of a voting system—"casting and tabulating" votes—and the federal definition including within its reach a number of specific aspects of voting. The two definitions also operate very differently in this context; § 9-102 imposes certification testing for devices covered by the term "voting system," whereas HAVA imposes no certification process whatsoever and fairly minimal performance requirements. Thus, using the broadest possible definition of voting system for purposes of HAVA would pose little risk of circumscribing State authority with respect to its own systems, whereas using the same definition for § 9-102 might seriously impede SBE's ability to manage election-related technology. In sum, we would hesitate to regard the federal definition as a gloss on the State definition.

A further problem with interpreting § 9-102 to automatically extend to all voting-related functions (regardless whether the function is performed by the voting system) is that such an interpretation would cover the absentee ballot-delivery system as well. That system performs a ballot-presentation function, and arguably a ballot-definition function also, for all UOCAVA voters who choose to receive their ballots electronically, whether or not the ballot wizard is used to facilitate use of the ballot-delivery system. Accordingly, if it were true that any technology that carries out a covered function requires State certification, as some have proposed, it follows that the online ballot-delivery system would be subject to that process too. We are unaware of any state having adopted so expansive an interpretation of its certification requirements and we

do not believe Maryland law commands this result either. For these reasons, we do not think the commenters' proposed reading of § 9-102 best reflects the language or structure of the statute.

With respect to commenters' concern about the protection of the voting system, the full certification regime prescribed in § 9-102, including testing under the EAC program, is designed to provide assurance about the security and reliability of the entire voting system and is, presumably, appropriately thorough to suit that purpose. Because even small modifications to the voting system have the potential to affect the system in unknown ways, re-testing and re-certification are also necessary following virtually any change to the system or a system component by the vendor. But where a device with no interaction or potential to affect the voting system is proposed, we believe a court would likely defer to the State Board's interpretation of § 9-102 to not demand the same re-certification process.¹⁸

The conclusion that the process outlined in § 9-102 is not mandated for the ballot wizard does not mean that no evaluation or testing is necessary; even in the absence of certification, the State Board may not act unreasonably in implementing the technology. *See, e.g., Fritzsche v. Maryland State Bd. of Elections*, 392 Md. 331, 341 (2007) (agency action must be supported by facts, within the scope of delegated authority, and not arbitrary, capricious, or unreasonable). The State Board must make the determination to move forward with the ballot wizard upon the basis of substantial evidence—evidence, we understand, that SBE is currently compiling through an ongoing testing process. SBE must also ensure that “security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results,” EL § 1-201(6), and that each ballot is “easily understandable,” “present[s] all candidates and questions in a fair and non-discriminatory manner,” “permit[s] the voter to easily record a vote on questions and on the voter's choices among candidates,” “protect[s] the secrecy of each voter's choices,” and “facilitate[s] the accurate tabulation of the choices of the voters.” EL § 9-203. These statutory standards continue to apply in the absence of certification, with the State Board delegated the authority to determine, in the exercise of its reasonable judgment, the form and extent of testing necessary to meet those standards.

It is important in this respect to acknowledge that State and federal law both include special provision for UOCAVA voters in light of the unique challenges these voters face. A known problem for all absentee voters, as compared to voters who are able to cast ballots in polling places, is a higher rate of “residual votes”—*i.e.*, the total number of votes that cannot be counted for a specific contest, whether because of overvoting, undervoting, or failure to properly

¹⁸ Notably, the circumstances under which SBE may decertify a previously certified voting system do not include the loss of federal certification. *See* EL § 9-103(a)(2) (requiring decertification “if the State Board determines that the system no longer merits certification” or the voting system will no longer, as required by § 9-102(d)(1)(i) through (iii), protect the “secrecy of the ballot” or the “security of the voting process,” or will no longer “count and record all votes accurately”).

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record the voter's intent. *See* Voluntary Voting System Guidelines, Appendix A: Glossary, at A-16, *available at* <http://www.nist.gov/itl/vote/upload/VVSG-Volume-IAppendixA.pdf> (last visited Aug. 16, 2012). SBE's ballot wizard is meant to address this problem by preventing overvotes and undervotes and by reducing the incidence of errors during the ballot-duplication process. Thus, provided SBE acts reasonably in testing the ballot wizard and deciding whether it is safe to deploy, making that tool available to UOCAVA voters appears to us to be consistent with the statute and legislative intent. Given SBE's statutory duty to "maximize the use of technology in election administration," EL § 2-102(b)(7), and the goal of the Election Article to emphasize "citizen convenience," EL § 1-201(5), we believe that the better interpretation of § 9-102 is not one that effectively precludes the use of a tool that could improve the accuracy with which absentee votes are counted.

III

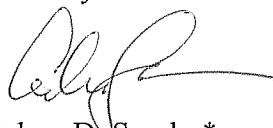
Conclusion

In summary, it is our opinion that, in the absence of governing case authority, the State Board may reasonably conclude that the ballot-marking wizard it proposes for UOCAVA voters does not itself constitute, or modify, a "voting system" such that it is subject to the certification requirements of § 9-102 of the Election Law Article.

Sincerely,



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Opinions & Advice

* Jeffrey Darsie contributed significantly to the preparation of this opinion.