

To: State of Colorado, Department of State

Re: Public Commentary for January 14, 2016 Hearing, Proposed Rulemaking concerning elections

Hart InterCivic respectfully submits the following comments regarding the proposed changes to Rule 11.9, "Purchases and Contracts."

OVERVIEW

1. We recommend that the proposed changes to 11.9.2, sub-section (a) be discarded, and that the current language remain unchanged.
2. We recommend that the proposed changes to 11.9.2, sub-section (b) be discarded, and that the current language remain unchanged.
3. We recommend that the proposed (new) 11.9.3 language be discarded.
4. We recommend that the proposed (new) 11.9.4 language be discarded.
5. Our overall rationale for the recommendations above is as follows:
 - The proposed changes are not necessary to support the goals of CRS 1-5-623, which are to discourage continued investment in older electronic voting system and to encourage the assessment and use of newer paper-based voting systems.
 - Not only do the proposed changes ***not*** support the goals of 1-5-623, but *they actively create impediments* to achieving the legislature's intent.
 - The proposed changes have adverse impacts on Colorado's political subdivisions, by restricting their ability to assess and choose new and/or emerging paper-based voting technologies.
 - The proposed changes have an adverse impact on the Colorado voting public, by restricting its access to diverse best-in-class paper-based election technologies.
 - Given the fact that the proposed changes...
 - Do not support the intent of CRS 1-5-623;
 - Prevent the furtherance of its goals; and
 - Pose harm to Colorado's political subdivisions and voters

....the only rationale that remains for making the proposed changes is a poor one, not based in law: namely, the desire of the Office of the Colorado Secretary of State (SOS) to simplify its workflow with a single-vendor solution and to bolster its influence through centralized management of that single system.

- None of these outcomes serve the original intent of the legislation, which is to discourage the use of older electronic voting systems and to encourage the assessment and use of new and/or emerging paper-based election solutions, all within a framework ***that explicitly assumes that political subdivisions shall have the ability to make such choices, consistent with these overall goals.***

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DETAILED COMMENTARY

The reasons for the recommendations above are as follows:

- 1) The proposed changes to 11.9 (and particularly to 11.9.2) are clearly not consistent with the legislative intent expressed in CRS 1-5-623.**
 - a) The General Assembly clearly states that its intent in CRS 1-5-623 is to reduce confusion regarding investments in voting technology, by discouraging continued investment in older electronic systems and to encourage the assessment and use of newer paper-based technologies.
 - b) It is apparent that the main thrust of the legislation is to favor future investment in certain types of voting systems, and, by extension, to provide guidance to political subdivisions about what types of investments the General Assembly prefers. The primary beneficiaries of this clarification are the political subdivisions, who are explicitly recognized as the entities that choose voting technology, and, ultimately, the Colorado voting public. In contrast, the main focus of the legislation is **not** on uniformity, **nor** upon the powers of the SOS, nor upon increased centralization at the SOS level.
 - c) None of the proposed rule changes are necessary to achieve the legislation’s intent; in the immediate circumstances, the Colorado SOS and Colorado political subdivisions have a wide array of new, modern choices for paper-based voting systems to choose from, and encouraging their ability to make such choices would fulfill the original intent of the legislation.

 - 2) The net effect of the proposed changes, which reduce the number of choices for modern, paper-based election technology available to Colorado political subdivisions, actually *creates impediments* to achieving the intent of CRS 1-5-623.**
 - a) CRS 1-5-623 explicitly recognizes that it is individual political subdivisions in Colorado that are responsible for selecting election technology that is consistent with the overall goals of the legislation, i.e. paper-based systems that reflect the latest trends in election technology, and that are not electronic systems from an older era.
 - b) The provisions of sub-section (3) are clearly intended to provide the SOS with a means to prevent counties from acquiring old technology that is not consistent with the desire for more modernized paper-based systems – but not to undo or violate the foundational assumption that political subdivisions have a measure of choice in the voting systems that they will use. In other words, the role of the SOS in this process should be properly viewed *as a vehicle to achieve the intent of the legislation, and not as an end in itself*. There is no language in the legislation that suggests an intent to impose uniformity or to centralize command of voting systems at the SOS level. On the contrary, it is clear that the approval process is there simply to ensure that the choices that a political subdivision might make are consistent with the overall intent of the legislation. (*“In making the determination, the Secretary shall prevent political subdivisions from making substantial investments in alternative technologies that will frustrate the intent of the General Assembly as specified in sub-section 1 of this section.”*)

 - 3) The proposed rule changes have an adverse impact on Colorado’s political subdivisions.**
 - a) The proposed changes prevent political subdivisions from having the ability to assess and choose modern paper-based voting systems based on their own needs – indeed, the effect of the proposed
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changes to 11.9.2 is to arbitrarily and needlessly impoverish the State’s access to diverse technologies. Rather than furthering the goals of 1-5-623, the proposed changes appear to be designed to support a different goal, not reflected in the legislation: namely, to facilitate the workflow of the SOS.

- b) The proposed changes violate the principle that political subdivisions are the entities that choose the voting technology they would like to use. The proposed changes to 11.9.2 arbitrarily and needlessly mandate only a single voting system that counties must use, thereby violating the assumptions of choice that are clearly expressed in sub-section (3).

4) The proposed rule changes have an adverse impact on Colorado’s voting public.

- a) By arbitrarily and needlessly denying Colorado’s political subdivisions the ability to choose from diverse modern voting systems with different features and capabilities, the SOS is imposing a “one size fits all” framework on the voting public. In terms of the voting experience, particularly with respect to accessible ballot marking devices, different systems have different strengths and weaknesses, and political subdivisions should have the ability to assess and choose what best meets the needs of the voting public. Adopting a “one size fits all” framework is especially problematic when the option selected by the SOS suffers from significant deficiencies such as segregated, unequal ballots for voters with disabilities, thereby compromising voter privacy and anonymity.

5) The main beneficiary of the proposed changes is the Office of the Secretary of State – not the political subdivisions, nor the Colorado voting public. This runs directly counter to the intent of the General Assembly, as expressed in CRS 1-5-623.

- a) It has been established that the proposed changes are not necessary to achieve the goals of CRS 1-5-623; that they actively impede Colorado counties from assessing and choosing from diverse options for modern paper-based technology; that they violate the legislation’s assumption that political subdivisions are empowered to choose investments in election technology that are consistent with the General Assembly’s preferences; and they deny the Colorado voting public access to a diverse array of features from different systems, including benefits as fundamental as a non-segregated, equal ballots for all voters. These facts illustrate in a stark way the extent to which the proposed changes sacrifice the laudable goals of 1-5-623 on the arbitrary altar of “uniformity” and centralized management.

Again, for all of the above reasons,

1. We recommend that the proposed changes to 11.9.2, sub-section (a) be discarded, and that the current language remain unchanged.
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