

Letter to All Legislators

Dear Senator/Representative:

On July 27, 2004, our office issued a "Status Report to the Legislature on Implementation of Washington's New Primary." Section five of that report focused on the provisional certification process for vote tabulating equipment necessitated by the new primary.

Our office just certified the final results of the primary this week and we want to take this opportunity to provide you with an update on the provisional certification process. We are aware that you have received communications from various groups on this process and we hope this information will assist in responding to these inquiries.

In summary, all vote counting and tabulating equipment used in the primary was properly certified under all applicable state laws and worked satisfactorily. The process to provisionally certify software for this primary was done openly and only after thorough testing. The software was thoroughly tested before, during, and after the primary.

By way of background, Washington State law provides that all vote tallying equipment and software be certified by the Secretary of State's Office.

State statutes also provide that all vote tallying equipment and software in Washington must have been used in another state. This statute does not apply, however, to requirements that are unique to the state of Washington.

State statutes do not require that this equipment and software be certified by the federal government. Our office, however, has by WAC rule adopted a policy that, absent emergency circumstances, all equipment and software receive approval through a federal independent testing review process.

The new Washington primary, commonly known as a "Montana style" primary, has been in use by other states for many years. As a result, the various vendors who provide vote tallying equipment and software for our counties have vote tallying equipment and software that is programmed for this style of primary.

Unfortunately, Washington's primary law differs from all the other "Montana style" primaries in one unique respect.

In all other such primaries, a voter who does not formally "pick a party" on a check box but who proceeds to vote a straight party ticket will have all votes cast for that party count. The rationale is that the voter's intent is clear and in these other states this practice is not specifically prohibited.

Washington's statute, however, has a specific provision that expressly provides that if the voter does not "pick a party" on a consolidated ballot, no votes for partisan office shall be counted.

Thus, Washington's primary has a statutory requirement that is unique to Washington and also unique to the software authorized for this form of primary.

Faced with this situation, our office considered two alternatives.

The first involved requesting a special session of the legislature to change our law to conform to the requirements of other states.

The second involved adopting emergency rules providing for a provisional certification process that would allow the counties and vendors to make the necessary changes and become certified under state law.

In July, we met with representatives in the Governor's Office to discuss this situation and the possibility of a special session of the legislature for this purpose. The Governor's Office advised a special session was not a realistic possibility at that time, and we certainly understand the reasons for that.

Accordingly, we moved forward to adopt emergency rules in July providing for a provisional certification process.

On July 27, 2004, we issued a Report to the Legislature that included a detailed description of this issue and advising our plans to move forward with a provisional certification of the software change. This report was circulated widely to all legislators, all media outlets in the state, all statewide elected officials, and all political parties.

The provisional certification applied to the six counties electing to use the consolidated ballot format and one county that used a combination of separate ballots for absentees and a consolidated ballot on Direct Recording Electronic (DRE) voting equipment. The separate ballot format does not have a "pick a party" box. Voters using separate ballots "pick a party" by selecting a party ballot.

The six counties using a consolidated ballot are King, Snohomish, Pierce, Kitsap, Chelan and Klickitat. Yakima County used a combination of separate and consolidated ballots.

All seven of these counties supported the provisional certification process and cooperated completely. In fact, several of the counties, including at least King and perhaps Snohomish, would have needed provisional certification of software to accommodate other features of the new primary. These changes were due to

the sheer volume of data necessary to create the multiple party contests related to PCO requirements and the “pick a party” feature.

The vendors for these counties proceeded to make the software changes pursuant to our provisional certification process and we scheduled public reviews in each of these counties to test the modified software.

In each instance, public notice was given in the affected community that the state would be testing the new software in a public setting. In each county, the testing process occupied a full day in which state and county officials ran decks of test ballots through the equipment. This was followed by a tedious hand counting process and a comparison of the results.

All of the testing was publicly noticed and open to the public and typically lasted eight hours. In several instances, members of the public did attend, observe, and pose questions. Testing was conducted for both a primary and general election at this time.

The testing of the provisional change in all seven counties was successful and the state issued a certification authorizing the use of this software for the primary and general elections.

Thus, all equipment and software used to tabulate votes in the primary election had proper certification under state law.

Those concerned about the provisional certification process correctly point out that the software in six counties did not have certification from the federal independent testing authorities. Yakima’s modification was certified through this process, but was given a provisional certification because of the time restrictions on modifications.

Federal testing or certification is not a requirement of Washington state law. State statutes only require state certification. The policy of our office, however, is to require a federal independent testing review in all instances in the absence of an emergency like the one presented here.

The provisional testing was not the only testing that occurred on this software.

One week before the primary, representatives from our office conducted “logic and accuracy tests” on all vote tabulating equipment in the state, including these seven counties. In all instances, the vote tabulating equipment was verified by hand-counted ballots and proved accurate in counting ballots.

The primary occurred on September 14, 2004 and all vote-counting and tabulating equipment in the state had state certification and worked satisfactorily.

Throughout the day of the primary, electronic voting equipment in Snohomish and Yakima counties was tested through a parallel monitoring process.

Following the primary, at the request of statutorily-designated party poll observers, King and Pierce Counties conducted manual recounts of ballots in three precincts. In all six precincts, the manual vote count exactly matched the equipment count in these precincts.

Now that the primary has been certified, questions have been raised about whether the state should allow this software to be used in the general election, and we offer the following on this issue.

Counties use this software not only to tabulate and count votes but also to design and prepare the ballot for the next election.

Because Washington has one of the latest primaries in the country, the time between certifying results of our primary and preparing for the general election is extremely short.

In our instance, counties completed counting and certified results to us on Monday, September 27 using this software. Even before certification, the counties were busy laying out the ballot for the general on this same software.

During this time, the counties are working under intense pressure to get ballots to the printers to ensure timely distribution to Washington voters and particularly to overseas voters.

These timelines simply do not allow an opportunity to remove certified software from thousands of voting machines, reinstall the former software, and test to ensure that the proper software has been installed and works correctly. It is also not advisable to build ballots in one version of a system and tabulate them in another.

In addition, the software modification only occurred to the “pick a party” feature in the primary. This feature will not be activated in the general election.

Finally, our office is confident that the state certified software is performing satisfactorily. We believe this because the software has been thoroughly tested through the following processes:

- the provisional certification process one month before the primary;
- the logic and accuracy tests conducted one week before the primary;
- the processing of 1.4 million votes through the primary itself;
- parallel monitoring conducted by Snohomish and Yakima Counties on election day;
- the manual recount tests occurring after the primary; and

- the logic and accuracy testing following the primary.

Under these circumstances, our office advises that making a software change at this time would introduce more risk and delay than continuing to use the software currently in place.

We appreciate your attention to these important issues and welcome any continuing questions you may have.

We look forward to working with you in the upcoming legislative session on election issues.

Sincerely,

Nick Handy
Director of Elections