

California Election Code
Division 19. APPROVAL OF VOTING SYSTEMS
Chapter 2 Secretary of State Requirements

19103. Ballot tally source code placed in an approved escrow facility.

- (a) An exact copy of the source code for all ballot tally software programs certified by the Secretary of State, including all changes or modifications and new or amended versions, shall be placed in an approved escrow facility prior to its use. No voting system may be used for an election unless an exact copy of the ballot tally software program source codes is placed in escrow.
- (b) The Secretary of State shall adopt regulations relating to the following:
 - (1) The definition of source codes for ballot tally software.
 - (2) Specifications for the escrow facility, including security and environmental specifications necessary for the preservation of the ballot tally software program source codes.
 - (3) Procedures for submitting ballot tally software program source codes.
 - (4) Criteria for access to ballot tally software programs source codes.
- (c) The Secretary of State shall have reasonable access to the materials placed in escrow, under the following circumstances:
 - (1) In the course of an investigation or prosecution regarding vote counting equipment or procedures.
 - (2) Upon a finding by the Secretary of State that an escrow facility or escrow company is unable or unwilling to maintain materials in escrow in compliance with this section.
 - (3) In order to fulfill the provisions of this chapter related to the approval of voting systems.
 - (4) In order to verify that the software on a voting system, voting machine, or vote tabulating devices is identical to the approved version.
 - (5) For any other purpose deemed necessary to fulfill the provisions of this code or Section 12172.5 of the Government Code.

CALIFORNIA CODE OF REGULATIONS
TITLE 2. ADMINISTRATION
DIVISION 7. SECRETARY OF STATE
CHAPTER 6. ESCROW OF BALLOT TALLY SOFTWARE PROGRAM SOURCE CODES

ARTICLE 1. GENERAL PURPOSE AND EFFECTIVE DATE

20610. Application of Regulations.

These regulations shall apply to every election, all or any portion of which is conducted under the authority of the Elections Code, by any jurisdiction which conducts elections and canvasses those elections by means of ballot tally software programs

20611. Reasons for Placing Software into Escrow.

Ballot tally software program source code(s) (or hereinafter: 'source code') shall be placed in escrow in order to:

- (a) Protect and enhance the integrity of elections by ensuring that ballot tally software programs used in California elections have not been tampered with or otherwise altered and that elections continue to accurately reflect the will of the voters as expressed by their votes on computer-read ballots;
- (b) Create a record of all versions, including changes or modifications of the source code materials placed in escrow;
- (c) Create a record of all applications for access to the source code materials placed in escrow;
- (d) Unless otherwise superseded by a contract between a vendor and an election jurisdiction, preserve the necessary source code information to permit the election jurisdiction to continue the use and maintenance of the source code in the event the vendor is unable, or otherwise fails, to provide maintenance.

20612. Use after Effective Date.

Once Chapter 6 of Division 7 of Title 2 of the California Code of Regulations becomes effective, the source code for any ballot tally software program intended for use by an election jurisdiction in California must first have been placed in an approved escrow facility. If the source code has not been placed in an approved escrow facility, no ballot tally software program derived from that source code may be used to tally any votes in any California election conducted pursuant to the Elections Code.

20613. Escrow Facility Must be Approved.

For purposes of this chapter, no escrow facility, including any which may have been providing such services for any vendor prior to the effective date of these regulations, may serve as an escrow facility for purposes of these regulations after the effective date without having first been approved by the Secretary of State pursuant to these regulations.

ARTICLE 2. DEFINITIONS

20620. Software.

"Software," generally, refers to "computer programs," a collection of instructions coded according to specific rules and in a specific sequence, which tell the computer equipment what to do and when and how to do it.

20621. Ballot Tally Software Program.

The "ballot tally software program" consists of the computer program or programs used to tally voted ballots in an election.

20622. Ballot Tally Program Source Code(s).

"Ballot tally software program source code(s)" or "source code" consists of the computer program or

programs used to translate or otherwise recognize votes, accumulate the total of those votes, and store that accumulated total to a storage media for later retrieval and reporting, and includes the version of a computer program in which the programmer's original programming statements are expressed in a source language (e.g. Ada, Assembler, COBOL, Fortran, etc.) which must be compiled or assembled and linked into equivalent machine-executable object code, thereby resulting in an executable software program.

20623. Escrow.

"Escrow" is the process by which a third party having no direct or indirect financial interest with a vendor holds, for safekeeping, the source code, including all changes or modifications and new or amended versions. A financial interest would exist if the third party, for instance, included a vendor's stocks in its portfolio.

20624. Escrow Facility.

"Escrow facility" is the physical location in which the source code may be stored. No election jurisdiction may act as an escrow facility to store its own source code.

20625. Escrow Company.

"Escrow company," for the purposes of this chapter, is any business certified by the Secretary of State to store source code.

20626. Escrow Agreement.

An "escrow agreement" is a contract or subagreement to hold each source code in escrow. The contract may be a master contract with separate subagreements to hold each source code in escrow or an individual contract entered into for each source code placed in escrow.

20627. Vendor.

A "vendor" is any person, group, organization, company, or entity, whether or not incorporated, who sells, leases, or grants use of, with or without compensation therefore, a ballot tally software program for use by jurisdictions which conduct elections subject to these regulations. The term "vendor" includes election jurisdictions which provide or maintain ballot tally software programs for their own use or for the use of others.

ARTICLE 3. THE SECRETARY OF STATE

A. CERTIFY ESCROW COMPANY

20630. Consider all Applications.

The Secretary of State shall consider all applicants for certification as an escrow company and shall certify, in writing, those that meet the minimum requirements set forth in these regulations.

B. APPROVE ESCROW FACILITY

20631. Review Procedures.

Prior to any approval, the Secretary of State shall review, for conformance with these regulations, the procedures proposed by each applicant escrow company for operation of its escrow facilities.

20632. Escrow Company Must be Certified and Escrow Facility Must be Approved.

No escrow facility may be used for escrow of any source code until certification has been granted to the escrow company and approval of the escrow facility for such use is received by the escrow company and displayed pursuant to Section 20661, subsection (a), of this chapter.

20633. Review and Processing of Applications for Certification or Approval.

(a) Within ten working days after receipt of an application for certification as an escrow company or approval of an escrow facility, the Secretary of State shall inform the applicant in writing whether the application is complete and accepted for filing or that it is deficient and what specific information or documentation is required to complete the application.

(b) Within thirty working days of receipt of a completed application, the Secretary of State will inform the applicant whether the application for certification or approval has been approved or denied.

C. REVIEW OF FACILITIES AFTER CERTIFICATION

20635. Periodic Inspections of Escrow Facilities.

(a) To ensure compliance with these regulations, the Secretary of State shall cause periodic inspections during normal business hours, with or without prior notice, of facilities used to escrow source code(s) and of such records maintained as required by this chapter.

(b) The Secretary of State reserves the right to inspect any facility for which a new application for approval is made.

20636. Action if Facility not in Compliance.

If the Secretary of State determines that any escrow facility is not in compliance with these regulations and other applicable law, he or she shall:

(a) Withdraw approval of the escrow facility to store one or more source code(s); and,

(b) Order the temporary removal of source code(s) from such facility, and the transfer of such source code(s) to facilities which are in compliance.

20637. Procedure to Withdraw Approval from Escrow Facility.

(a) No action to withdraw approval of a facility to store ballot tally software program source code shall commence until the Secretary of State has mailed a written 30-day notice. The notice shall be sent to the escrow company, the escrow facility, and the vendor(s) storing source code(s) at the facility.

(b) Within ten days of the date of mailing of the 30-day notice, a representative of the escrow facility may request an administrative hearing with the Secretary of State to appeal the determination of non-compliance. The escrow facility shall notify the vendor that a hearing has been requested. If the vendor has received notice of request for administrative hearing, he or she shall notify the election jurisdiction, no later than three days after receipt of such notice, that a hearing has been requested and shall send copies of such notification(s) to the Secretary of State.

(c) Any vendor receiving a notice pursuant to subdivision (a) shall within 10 days of the date of the notice advise in writing any election jurisdiction using a ballot tally software program derived from the source code which has been placed in escrow that the Secretary of State will conduct an administrative hearing. The vendor shall notify the affected election jurisdiction(s) that a hearing has been requested.

(d) Within ten days of receipt of the request for an administrative hearing, the Secretary of State shall schedule the hearing and notify the representative of the escrow facility, the vendor, and other interested parties.

(e) Within five days after the administrative hearing, the Secretary of State shall notify the representative of the escrow facility, the vendor, and other interested parties of the decision on the appeal.

20638. Escrow Company to Comply when Escrow Facility Approval Withdrawn.

Once the Secretary of State has issued an order to remove or transfer the ballot tally software program source code and materials, the escrow company shall comply with the order within 24 hours of receipt of the order.

D. LIST OF APPROVED COMPANIES AND FACILITIES

20639. List of Certified Escrow Companies and Approved Escrow Facilities.

The Secretary of State shall mail, by first class mail, to the chairperson of each county board of supervisors, to

each county chief elections official, to each certified escrow company, to each approved escrow facility, and to each vendor of ballot tally software source code, a complete list of all certified escrow companies and their facilities approved for use in California no later than January 30 of each year, and within ten days of any change affecting the list.

ARTICLE 4. THE VENDOR

A. GENERAL

20640. Separation of Vendor Interests from Escrow Company.

The vendor, its officers, and directors, shall not hold or exercise any direct or indirect financial interest(s) in the escrow company.

20641. Vendor Certification of Deposit.

(a) Within five working days of any submission of source code materials, each vendor shall certify to each affected election jurisdiction, with a copy to the Secretary of State, that they have placed their source code or codes in escrow. The certification shall include a description of submitted materials sufficient to distinguish them from all other submissions.

(b) The certification shall state:

(1) That all source code information and materials required by these regulations and other applicable law are included in the deposit.

(2) The name of the certified escrow company and the location of the approved escrow facility where the source code materials have been placed in escrow.

(c) Any election jurisdiction which thereafter may desire to contract for use of a ballot tally software program shall be provided with a copy of the certificate as a condition precedent to the execution of the contract.

B. WHAT THE VENDOR IS TO SUBMIT TO THE ESCROW COMPANY FOR PLACEMENT INTO THE ESCROW FACILITY

20642. Requirements for Submission.

(a) The vendor shall submit the source code, as defined in Article 2, to a certified escrow company for placement in the approved escrow facility.

(b) For each source code, the materials placed in escrow must be sufficient to maintain every related ballot tally software program used or intended to be used by any election jurisdiction.

C. UPDATES TO MATERIALS IN ESCROW

20645. Updates to Submission.

(a) Once used to tally ballots in any election, no source code materials in escrow may be changed or modified. Except as specified in this section, change or modification requires that a new escrow be established.

(b) Once used to tally ballots in any election, the unchanged source code shall be retained, at a minimum, for the period of retention required by the Elections Code for other election materials at the same election.

20646. Deposit Software Modifications into Escrow.

(a) Prior to being used to tally ballots in any election, the vendor shall submit all source code changes or modifications into escrow in the same manner and under the same conditions in which the source code materials originally were placed in escrow.

(b) Within five working days of the submission to the escrow facility of the changed or modified source code, the vendor shall notify each affected election jurisdiction as provided for in Section 20641, with a copy to the Secretary of State, that the source code placed in escrow has been changed or modified.

ARTICLE 5. THE ESCROW COMPANY

A. MINIMUM REQUIREMENTS AND STANDARDS OF PERFORMANCE

20650. Minimum Requirements for Certification.

A certified escrow company shall:

- (a) Be authorized by the Secretary of State to operate its escrow facilities.
- (b) Submit a copy of every escrow agreement to the Secretary of State. The copy shall be submitted by the escrow company within ten days of the date the escrow agreement is signed.
- (c) For every submission of an escrow agreement, maintain records which sufficiently identify and describe the materials deposited in escrow to determine compliance with the agreement between the vendor and the escrow company. The escrow company shall not be required to verify the content of the materials submitted.
- (d) Notify, in writing, the Secretary of State within five days of the initial deposit of source code. The notice shall include the name of the vendor and a list describing each of the items comprising the initial submission.
- (e) Notify, in writing, the Secretary of State within five days of the termination of any escrow agreement.
- (f) Notify, in writing, the Secretary of State within five days of the change of the name of the company or the name of the escrow facility, together with the address, phone number, and name of the contact person for the company and/or facility.

20651. Separation of Interest of Escrow Company with Vendor.

The escrow company, its officers, and directors, shall not hold or exercise any direct or indirect financial interest(s) in the vendor.

B. START-UP

20652. Escrow Company Certification and Escrow Facility Approval Required.

Applications for certification as an escrow company and for approval of each escrow facility shall be made in writing to the Secretary of State on the form contained in Appendix A: Forms of Application for Certification and Approval (June 1995).

20653. Approval for Additional Facilities Required.

Applications for approval of an escrow facility not included in the original application shall be made in writing to the Secretary of State on the form contained in Appendix A: Forms of Application for Certification and Approval (June 1995).

C. TERMINATION OF CERTIFICATION

20654. Term of Certification.

Certification remains valid until surrendered by the escrow company or until revoked by the Secretary of State.

ARTICLE 6. THE ESCROW FACILITY

A. MINIMUM SPECIFICATIONS

20660. Location of Approved Escrow Facilities.

Each approved escrow facility shall be physically located within the State of California.

20661. Escrow Facility to Post Notice of Approval.

(a) The approved escrow facility shall post a copy of the 'Notice of Approval (June 1995)' (see Appendix B: Form of Notice of Approval.) in its business office. The notice shall be posted in a place conspicuous to the public and must also be located so that it is easily readable by members of the public doing business at the escrow facility.

(b) No ballot tally software program source code shall be placed in escrow in the facility until the Notice of Approval is posted according to this section.

20662. Requirements for Escrow Facilities.

For all ballot tally software program source code materials each escrow facility shall:

(a) Provide a secure and safe environment in which the humidity, temperature, and air filtration are controlled on a 24-hours-a-day, 7-days-a-week basis. The humidity shall be maintained at 35 percent, plus or minus 2 percent, and the temperature shall be maintained at 65 degrees, plus or minus 3 degrees, Fahrenheit.

(b) Maintain storage away from electrical, magnetic, and other fields which could potentially damage computer media over time.

(c) Have backup capability to maintain the properly secured environment in the event of power outages or natural disasters.

(d) Maintain physical security of the escrow facility with controlled and restricted access to source code materials placed in escrow.

(e) Store each source code separately. The source code materials placed in escrow shall be secured in a single container and no other material shall be placed in that container.

B. TERMINATION OF APPROVAL

20663. Continued Approval of Escrow Facility.

Approval remains valid until surrendered by the escrow company or until revoked by the Secretary of State.

ARTICLE 7. ACCESS TO AND REVIEW OF MATERIALS IN ESCROW

20670. Conditions for Access to Materials Placed in Escrow.

No access to materials placed in escrow shall occur except as specified in (a) or (b) of this section.

(a) Upon an order of an appropriate court in the course of an investigation or prosecution regarding vote counting equipment or procedures. The court order shall specify the procedures for reviewing the materials in escrow, including, but not limited to, the name of each person permitted to review the materials, the person or persons responsible for guaranteeing that the materials are not tampered with or otherwise altered, and the time, place, and other conditions under which the materials may be reviewed.

(b) Upon a finding by the Secretary of State that an escrow facility or escrow company is unable or unwilling to maintain materials in escrow in compliance with these regulations.

20671. Verification of Materials Placed in Escrow.

The Secretary of State may, in furtherance of these regulations, for cause at any time, audit source code materials placed in escrow with an approved escrow facility or a facility for which approval has been withdrawn pursuant to these regulations, for purposes of verifying the contents.

20672. Integrity of Materials Placed in Escrow.

No person having access to the ballot tally software program source code materials shall interfere with or prevent the escrow representative from monitoring the security and the integrity of the ballot tally software program source code materials.

ARTICLE 8. THE ESCROW AGREEMENT

A. MINIMUM ELEMENTS

20680. Vendor Agreement for Escrow Deposits.

A vendor may enter into a written agreement with any certified escrow company for deposit of each source code.

20681. Minimum Terms Required in Agreement.

The terms of the agreement between the vendor and the escrow company shall include, but not be limited to, the following elements:

(a) Conflict in Financial Interest:

- (1) The escrow company, its officers, and directors, do not hold or exercise any direct or indirect financial interest(s) in the vendor.
- (2) If a condition in financial interest(s) as specified in this section arises, the escrow company shall:
 - (a) Advise the vendor of the conflict in financial interest.
 - (b) Immediately notify any affected election jurisdictions of the conflict in financial interest.
 - (c) Transfer the ballot tally software program source code materials in escrow to another certified escrow company which has no financial interest(s) as specified in this article with the vendor.
- (3) The vendor, its officer, and directors, do not hold or exercise any direct or indirect financial interest(s) in this escrow company.
- (4) If a conflict in financial interest(s) as specified in this section arises, the vendor shall:
 - (a) Advise the escrow company of the conflict in financial interest.
 - (b) Immediately notify any affected election jurisdictions of the conflict in financial interest.
 - (c) Transfer the ballot tally software program source code materials in escrow to another certified escrow company which has no financial interest(s) as specified in the article with the vendor.

(b) Retention of Election Materials:

- (1) Records maintained by the escrow company pursuant to these regulations and other applicable law shall be retained for the term of the escrow agreement, and for an additional period of 22 months after any election at which the source code was used. The vendor shall be entitled at reasonable times during normal business hours and upon reasonable notice to the escrow company during the term of the escrow agreement to inspect the records of the escrow company pertaining to the escrow agreement.
- (2) If the Secretary of State informs the escrow company that an election contest, or a criminal prosecution involving fraudulent use of the ballot tally computer program, has been timely commenced, then the source code shall not be removed from the escrow facility until the later condition of either the 22- month period has expired or the Secretary of State has determined and notified the escrow company that the necessity for retention has ended.
- (3) The escrow agreement shall provide for the disposition of the materials placed in escrow pursuant to subdivision (b)(1) or (b)(2).

(c) Change or Modification to Source Code:

- (1) No source code placed in escrow shall be changed or modified except as permitted in this chapter.

(d) Duration and Renewal:

- (1) The time period for the escrow agreement and the date for renewal of the agreement.
- (2) A provision that the escrow agreement may be renewed for additional periods.
- (3) The due date for renewal shall be no later than 30 days before expiration of the escrow agreement. In the event that the contract is not renewed, the escrow company shall so notify the vendor and the Secretary of State.
- (4) In the event that a vendor does not enter into an escrow arrangement with the escrow company to

renew the escrow contract, an election jurisdiction or jurisdictions may negotiate directly with an approved escrow company for continuance of the escrow, and shall so notify the Secretary of State and the vendor in writing within 30 days of the new contract.

(e) Access to Materials in Escrow:

(1) In the event that the escrow company is notified by an election jurisdiction of the occurrence of a condition as defined in the escrow agreement allowing access to ballot tally software program source code materials, the escrow company shall immediately so notify the vendor and the Secretary of State and shall provide a copy of the notice from the election jurisdiction.

(2) If the vendor provides an objection in writing within 10 days of the mailing or other service of the notice to the vendor, the escrow company shall not allow access. If the vendor does not object as provided in this subdivision, the escrow company shall permit access to the deposit to the election jurisdiction.

For the purposes of this section "object" or "objection" means the delivery by certified mail of an affidavit or declaration to the escrow company by the vendor, with a copy to the election jurisdiction which is demanding access and a copy to the Secretary of State. The objection shall state that an access condition either has not occurred or no longer exists. Upon receipt of the objection, the escrow company shall not permit access and shall continue to store the deposit pursuant to the escrow agreement.

B. STATEMENT OF NON-LIABILITY

20682. State Not Liable for Any Costs or Any Other's Actions.

Neither the Secretary of State nor the State of California shall be responsible for any of the fees claimed by the vendor, election jurisdictions, or the escrow company to establish the escrow contract. Further, neither the Secretary of State nor the State of California is a party to the agreement and shall not incur any liability for the actions of the parties involved in this escrow agreement.