

Voting Modernization Board

Background

The Voting Modernization Board (VMB) was established by the passage of Proposition 41 – Voting Modernization Act of 2002 (“Act”), approved by the voters on March 5, 2002. The purpose of this Act was to allow the state to sell \$200 million in general obligation bonds to assist counties in the purchase of updated voting systems. Voting systems are defined by the Act as “...any voting machine, voting device, or vote-tabulating device that does not utilize prescored punch card ballots” and are certified for use in California.

General Authority

The VMB was given the authority to “...reject any application for fund money it deems inappropriate, excessive, or that does not comply with the intent of this article.” The Act further states that a county whose application is rejected shall be allowed to submit an amended application.

The Act established the criteria of eligibility for counties to apply for the fund money. A county is eligible to apply to the VMB for fund money if it meets all of the following requirements:

- A. The county has purchased a new voting system after January 1, 1999, and is continuing to make payments on that system on the date that this article becomes effective.
- B. The county matches fund moneys at a ratio of one dollar (\$1) of county moneys for every three dollars (\$3) of fund moneys.
- C. The county has not previously requested fund money for the purchase of a new voting system. Applications for expansion of an existing system or components related to a previously approved application shall be accepted.
- D. Fund moneys shall only be used to purchase systems certified by the Secretary of State, pursuant to Division 19 (commencing with Section 19001), and in no event shall fund moneys be used to purchase a voting system that utilizes prescored punch card ballots.
- E. Any voting system purchased using bond funds that does not require a voter to directly mark on the ballot must produce, at the time the voter votes his or her ballot or at the time the polls are closed, a paper version or representation of the voted ballot or of all the ballots cast on a unit of the voting system. The paper version shall not be provided to the voter but shall be retained by elections officials for use during the 1 percent manual recount or other recount or contest.

VMB Adopted Policies and Actions

While the Act is specific regarding the eligibility requirements for counties to apply for the funds, it does not specify the operating procedures for how the funds will be applied for, the timeframe in which the funds will be disbursed, or the amount to be allocated to each county.

The Secretary of State's Office developed proposed operational policies and procedures for the Voting Modernization Board. These policies and procedures were adopted by the VMB at its first meeting on June 6, 2002. The Secretary of State's Office and the VMB entered into a Memorandum of Understanding (MOU) to have the Secretary of State's Office designated personnel serve as staff to the VMB and assist them with administering the Act.

The Act does not indicate a schedule for allocation of funds to counties to modernize voting systems. At the first meeting of the VMB, staff presented schedule options for the distribution of funds. The staff recommended that the VMB adopt an aggressive schedule to get the funds to the counties as quickly as possible. This recommendation was largely based on the fact that counties would need an aggressive schedule to modify and convert systems and train staff in order to have a successful conversion. Most specifically, nine counties in California (Alameda, Los Angeles, Mendocino, Sacramento, San Bernardino, San Diego, Santa Clara, Shasta, and Solano) were under an order of a federal court to convert from their Votomatic or Pollstar Punch Card Voting Systems by the March 2, 2004 Presidential Primary Election. After receiving the staff recommendation and strong support from the public comments at the meeting, the VMB adopted an aggressive schedule to allocate and distribute funds.

The VMB considered many different options to allocate funding to the counties. At the July 17, 2002, VMB meeting, after much deliberation and public testimony, the VMB adopted a formula based allocation for all of the counties. The VMB allocated funds to each county based on a formula that gives equal weight to the number of persons eligible to vote, the number of registered voters, the average number of persons who voted at the last four statewide elections, and the number of polling places (all numbers were based upon March 5, 2002 Primary Election data).

Once the formula allocations were established for each county, all 58 counties were invited to apply for their formula funding allocations. The staff developed a proposed "Funding Application and Procedural Guide" establishing a process for counties to apply for the funds and explaining the requirements of the counties to secure their funding. Although the Act did not specifically require that the new voting system equipment be accessible to the disabled community, the VMB requested that counties specify in their applications an "Accessibility Plan" describing how their county will use the funds allocated by the Act to provide a meaningful voting opportunity for persons with disabilities.

At the September 16, 2002, meeting of the VMB, 51 counties submitted complete "Applications for Funding Consideration" and the VMB approved the reserve of their funding

allocations pending submittal of their full "Project Documentation Plan". The seven counties that did not apply for their formula allocations were allowed a final opportunity to submit the "Applications for Funding Consideration" by the May 14, 2003, meeting of the VMB. All 58 counties have submitted, and the VMB approved, their "Applications for Funding Consideration" thus reserving their formula allocations.

A "Project Documentation Package" detailing a county's voting system conversion plan and executed vendor contract is required as part of the application for funding process. By requiring this detailed conversion plan and signed vendor contract from the county before any funding award and disbursements occur, the VMB is able to ensure that the new voting system the county plans to convert to would comply with the specific requirements of the Act. As of May 2004, 21 counties have submitted their "Project Documentation Package" and have been issued a "Funding Award" letter authorizing disbursement of their specified formula allocation.

The Act also required the VMB to obtain the Governor's approval on a "Statement of Plans and Projects" in order to have the Voting Modernization Finance Committee issue the sale of bonds or obtain a Pool Money Investment Board loan to authorize funding into the Voting Modernization Fund. The "Statement of Plans and Projects" outlines the allocation criteria and specifies that the county's allocation will be set aside until the county submits a complete and acceptable Project Documentation Package in order to establish a payment schedule for the county.

Paper Trail

At the onset of VMB meetings, it was determined that the eligibility requirement of "Any voting system purchased using bond funds that does not require a voter to directly mark on the ballot must produce, at the time the voter votes his or her ballot or at the time the polls are closed, a paper version or representation of the voted ballot or of all the ballots cast on a unit of the voting system. The paper version shall not be provided to the voter but shall be retained by elections officials for use during the 1 percent manual recount or other recount or contest" (Elections Code § 19234 (c) (e)), was satisfied because all certified Direct Record Electronic (DRE) and touch screen voting system units being sold for use in California, could produce a paper audit trail from ballot images stored in the units and results could be produced and manually tallied for recounts. This interpretation of the paper trail requirement, as applied to the administration of the Act, is the policy of the VMB.

In November 2003, the Secretary of State instituted a directive that required all counties who used certified DRE units to retrofit their DRE units with an Accessible Voter Verified Paper Audit Trail (AVVPAT), (a paper record of a ballot printed for the voter to confirm before the voter casts his or her ballot) by July 1, 2006.

On April 30, 2004, the Secretary of State superceded this directive by issuing orders decertifying the use of DRE voting systems in California, but allowed the counties who used DRE's in the March 2, 2004 Primary Election to use these systems in the November 2, 2004

General Election, if they either installed an Accessible Voter Verified Paper Audit Trail (AVVPAT) before the November Election, or if they meet 23 security measures identified in the order. The order decertifying all DRE systems in California also requires that all “new” DRE voting systems purchased in California after April 30, 2004 must include an Accessible Voter Verified Paper Audit Trail (AVVPAT).

While the de-certification of all DRE systems in California does not necessarily impact prior actions taken by the VMB, it could impact the counties who have not begun the modernization of their voting equipment because it essentially places a moratorium on the sale of DRE units in California until vendors can develop and obtain certification for system that meet the AVVPAT requirements.

Given the Act’s requirement that all fund moneys only be used to purchase systems certified by the Secretary of State, until there are DRE units certified with the AVVPAT components, the VMB will only be able to consider approving allocations for counties who are upgrading to optical scan voting system technology.

Upgrading to Accessible Voting Equipment

The Act does not specifically require that new voting equipment being purchased with the funds be accessible to voters with disabilities; however, the VMB has recognized the importance of accessible voting equipment. Both the “Application for Funding Consideration” and “Project Documentation Package” require that counties submit an explanation of how they will use their allocations to purchase voting equipment that provide a meaningful voting opportunity for persons with disabilities and to provide a comprehensive “Accessibility Plan” on how their county will comply with the state and federal requirements for accessible voting equipment.

As of January 1, 2003, California state law under Elections Code section 19227 requires the Secretary of State to adopt regulations, in consultation with representatives of blind consumer organizations and other experts, to make all voting systems (except absentee systems), equally accessible to persons who are blind and visually impaired. This section further requires that at each polling place at least one voting unit be accessible, as established for use under the adopted Secretary of State regulations, to individuals who are blind or visually impaired. Compliance with this section is only required by local agencies (or counties) if “sufficient funds are available” via funds received from the proceeds of the Voting Modernization Bond Act of 2002 or from federal funds made available to purchase new voting systems. Any voting system equipment purchased by a county before the effective date of this section, January 1, 2003, would not be required to comply with this section until such time as it upgrades or replaces any already procured voting equipment. However, a question has arisen whether any county using funds from the Act to purchase new voting equipment after January 1, 2003, would be required to comply with this code section.

Federal legislation established the Help America Vote Act of 2002 (HAVA), which requires voting system equipment to meet specified standards by January 1, 2006. Included in these

standards is a requirement to have one accessible voting machine in each polling site or full conversion to an accessible DRE option.

The newly formed Election Assistance Commission (EAC) is required under HAVA to develop voluntary voting system guidelines. These guidelines could potentially impact the certification process of voting systems in California and would affect the VMB in as much as the VMB would only be able to allocate funding awards for the purchasing of certified voting equipment.

State Accessibility Requirements Related to the Project Plan Phased Approach

Recognizing that modernizing voting systems is a large undertaking, the VMB has allowed counties to submit voting system conversion modernization plans to be implemented in phases. The policy to allow the counties to upgrade their voting equipment in multiple phases requires that counties adhere to state and federal accessibility requirements within one of their phases.

Elections Code § 19227(b), requires that funds received from the Act shall be used for the purpose of placing one accessible voting unit in each polling place. It can be asserted that funds from the act WILL be used to comply with state law as part of a phased county voting system equipment modernization. Elections Code § 19227(b) does not state that ALL funds received from the Act be used to comply with the accessibility requirement.

The VMB has awarded phased approach funding to eight counties, which include: Lassen, Los Angeles, Mariposa, Mendocino, Placer, San Francisco, Santa Barbara and Siskiyou. Of the eight counties, seven purchased their optical scan voting equipment prior to January 1, 2003; the date Elections Code § 19227(b) became effective. Mendocino County purchased their new voting system in July 2003. Mendocino County's plan is to use their optical scan equipment as their precinct and absentee voting system and will include one DRE unit at each polling site once their vendor has developed DRE equipment with the AVVPAT component and secures all federal and state certification. (See *Attachment A* for additional information)

Funds made available to the counties from the VMB in multiple phases, will be used to upgrade their voting systems to meet the accessibility requirement. Therefore, the "phased" approach for upgrading voting systems still appears to be acceptable under the newly imposed state law accessibility requirements.

It should also be noted that until the Secretary of State's Office formally adopts the regulations outlining the requirements to make voting systems equally accessible to persons who are blind and visually impaired, as required by Elections Code § 19227(a), the requirements of sub-section (b), to have one accessible voting equipment in each polling place, would not be enforceable.

State and Federal Compliance Deadlines

At the December 17, 2002, VMB meeting, the VMB adopted a January 1, 2005, deadline for counties to receive approval from the VMB for Project Documentation Packages. Under this adoption, counties that do not receive approval by the January 1, 2005 deadline forfeit their Approved Allocation. The Act does not have a deadline for when the funds need to be approved or disbursed to the counties. This deadline was adopted as a policy and could be reconsidered by the VMB at any time.

HAVA has the deadline for compliance with voting systems standards (to include accessible voting equipment) and to replace identified punch card voting system equipment by January 1, 2006.

The actions of the VMB to assist the counties in meeting the new federal voting system requirements is good public policy; however, the VMB is not strictly obligated to do so under the Act. The VMB has taken the requirements of HAVA into consideration while awarding funds to counties.

The Voting Modernization Fund and the HAVA Federal Trust Funds are not linked together. Both HAVA and the Voting Modernization Bond Act were passed to further the overall advancement of modernizing voting systems, and while both acts afford money to be disbursed to counties to upgrade voting systems, they are independent of each other.

The \$195 million Voting Modernization Fund money is to be used to assist counties in purchasing modernized voting systems certified for use in California.

Under HAVA there are two areas established in the Federal Trust Fund that allocates money for modernizing voting systems. The first is under the Title I – Sec. 102 Replacement of Punch Card or Lever Voting Machines section, in which California was allotted \$57,322,707.00 to replace all punch card machines (Datavote, Pollstar and Votomatic systems) by January 1, 2006. The amount of funds for the 30 eligible counties in California is prescribed by a formula (\$3,192.22 for each “qualifying precinct”, defined as precincts using a Punch Card voting system during the November 2000 General Election). HAVA specifies that the Section 102 money can only be used for this purpose. The second is under Title II of HAVA, which establishes allocations to states to assist with complying with Title III the Uniform and Non-Discriminatory Election Technology and Administrative Requirements. This section includes the HAVA voting system standards and compliance requirements for accessible voting equipment.

VMB Project Documentation Package Deadline

The requirement for counties to submit "Project Documentation Packages" has been established by the VMB in the adoption of the "Funding Application and Procedural Guide", and the "Statement of Plans and Projects" signed by the Governor. It has also been incorporated as the VMB's requirement for funding, in documents submitted to the Voting Modernization Finance Committee, and to request a Pool Money Investment Loan to fund the Voting Modernization Fund.

The requirement for counties to submit "Project Documentation Packages" to the VMB has been incorporated as standard practice. The Act does not specify a deadline to allocate the fund monies. Therefore, the VMB could reconsider the January 1, 2005, deadline for counties to submit their "Project Documentation Packages."

The VMB many want to consider the following options before determining if a new project plan deadline should be instituted.

Option One:

The VMB could maintain the adopted January 1, 2005, project plan deadline and motion that counties that do not receive approval by the January 1, 2005, deadline forfeit their Approved Allocation. Maintaining this date could allow the VMB to conduct additional funding rounds for the money not used by the deadline. The VMB could reallocate these reverted funds to counties who have converted to new systems by the deadline but did not receive enough funding to pay for their new system. In addition, the reallocated funds could be used to offset the costs to counties that have already converted to DRE systems that are required to upgrade to the new AVVPAT requirement.

Option Two:

The VMB could maintain the January 1, 2005, deadline, but allow counties who have not entered into a contract with a vendor (to upgrade their voting system) to submit a "Status Report" on their modernization progress. If the county's "Status Report" is determined by the VMB to show sufficient progress in modernizing their voting systems, the VMB could allow a county to reserve their Approved Allocation funding amount on a case-by-case basis. This option would not be construed as a blanket extension to all counties but could allow the VMB some leeway with specific counties before their funds are reverted for a second funding round.

Option Three:

The VMB could move the deadline to July 1, 2005, to better align with the counties with meeting the HAVA deadline. By moving the deadline to July, it could assist counties in their planning process to secure vendor contracts at least six months before the HAVA January 1, 2006, compliance deadline. On average, a county's Request For Proposal process (to

enter into a contract with a vendor) takes approximately six-months to complete. By establishing this deadline, the VMB could compel the counties to meet the HAVA requirements and accelerate the voting system modernization process in California.

Option Four:

The VMB could move the deadline to January 1, 2006, to be consistent with HAVA. By moving the deadline to January 1, 2006, it could assist counties who have been reluctant to begin modernizing their voting equipment due to the uncertainty of the standards to be applied to new voting equipment technologies. The decision to de-certify all DRE voting systems, which essentially places a moratorium on the sale of these systems in California, could also warrant the extension. With more than half of the 58 counties yet to begin upgrading their voting systems and the counties vigorously supporting moving the deadline, extending the deadline to January 1, 2006, could be considered a practicable option.

Option Five:

The VMB could move the deadline to January 1, 2006, making the compliance deadline consistent with HAVA, but require each county to submit "Interim Status Reports" on their voting modernization status until they fulfill the Project Documentation Package requirement. While this option may not address the VMB policy for counties to move on an aggressive schedule, it would allow the counties additional time before they are required to upgrade to new voting technology and ensure the funds are being used appropriately. This option could enable the VMB address the concerns of the counties regarding the unknown availability of certified systems to be sold in California, while giving the them the ability to ensure that counties are moving forward in the development of their voting system modernization plans.