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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 320
AS AMENDED BY
SENATE AMENDMENT NO. 2
AND
SENATE AMENDMENT NO. 27

AN ACT TO AMEND TITLE 15 OF THE DELAWARE CODE RELATING TO ELECTIONS.

WHEREAS, federal law establishes the Tuesday next after the 1st Monday in November as the day for the election of Representatives and Delegates to Congress; and

WHEREAS, § 1, Article V of the Delaware Constitution is very similar to federal law, requiring that the "general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot"; and

WHEREAS, § 1, Article V of the Delaware Constitution also provides that "the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat"; and

WHEREAS, it is well-established that states can allow voting by mail without violating federal law, because the election is still considered as consummated on election day; and

WHEREAS, many state courts have upheld voting by mail laws, following this line of federal cases; and

WHEREAS, the language in § 1, Article V of the Delaware Constitution is very similar to the language in federal law under which voting by mail ballot has been upheld and also provides that the General Assembly may by law prescribe the means, methods and instruments of voting; and

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WHEREAS, the General Assembly finds that voting by mail ballot is a method of voting that is within the General Assembly's power to establish under § 1, Article V of the Delaware Constitution, because the election is consummated on election day; and

WHEREAS, in 2020, approximately 160,000 Delawareans voted absentee using mail ballots under Chapter 56 of Title 16 as enacted by House Bill No. 346 (150th General Assembly).

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Part IV, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 56A. Voting by mail ballot.

§ 5601A. [Reserved.]

§ 5602A. Applicability.

This chapter applies to the following elections:

(1) A non-presidential primary election.

(2) A general election.

(3) A special election to fill a vacancy in a statewide office, the General Assembly, or an office covered under Chapter 73 of this title.

§ 5603A. Voting by mail ballot.

Votes cast by mail ballot under this chapter shall be counted in the total for the election district in which the elector is registered.

§ 5604A. Process for voting by mail ballot.

(a) The Department shall create an application which may be completed by any elector wishing to vote by mail under this chapter. The application must require the elector to provide 1 of the following:

(1) The last 4 digits of the elector's social security number.

(2) The elector's State-issued driver's license number.

(3) The elector's State-issued nondriver identification card number.

(b) A qualified, duly registered elector wishing to vote by mail must do all of the following:

(1) Complete a handwritten or electronic application to vote by mail.

(2) Sign and date the application.

(3) Mail, deliver, or cause to be mailed or delivered, the completed application to the Department by the deadline provided by the Department.

§ 5605A. Distribution of ballots, envelopes, and instructions.

(a) Upon receipt of the application for a mail ballot from an elector under § 5604A of this title, the Department shall process the same and confirm that the elector qualifies to vote under this title.

(b) No more than 30 days but not less than 7 days before an election, and within 3 days after the ballots, ballot envelopes, and instructions become available, the Department shall mail all of the following to each elector who requested and qualified for a mail ballot:

(1) A mail ballot for the election district in which the elector resides.

(2) The instructions for completing and returning the mail ballot under § 5607A of this title.

(3) The ballot envelope required under § 5606A of this title.

(c) Postage for all mailings under subsection (b) of this section must be pre-paid by the Department.

(d) This section does not prevent the issuance of a mail ballot to a qualified elector when the request is made less than 7 days before the election.

§ 5606A. Requirements for ballot envelope; numbering and coding; voter identification label; statement of eligibility.

(a) With each mail ballot, the Department shall also provide each elector an envelope that is all of the following:

(1) A color other than white.

(2) Large enough to hold a completed ballot.

(3) Designed to protect its contents from tampering, removal, or substitution without detection.

(4) Addressed for return to the Department.

(b) All of the following must appear on each envelope provided under subsection (a) of this section:

(1) The words “BALLOT ENVELOPE”.

(2) An alphanumeric symbol or barcode for use in accounting for the mail ballot.

(3) Identification information for the elector receiving the mail ballot, including all of the following:

a. The name of the county within which the elector is domiciled.

b. The elector’s name.

c. The elector’s address.

d. The elector’s election district.

e. The elector’s representative district.

f. Any other information required by the Department.

(4) The following oath:

"I do solemnly swear (affirm) that to the best of my knowledge I am eligible to vote in the State of Delaware and that my voting address is as it appears on the label on this envelope. I also do solemnly swear (affirm) under penalty of perjury that I have not received or accepted, or offered to receive or accept, any money or other item of value as compensation, inducement, or reward for the giving or withholding of a vote at this election, nor that I am acting under duress or threat of duress or harm."

(5) A designated space for the elector's signature.

(6) A designated space for the elector to provide 1 of the following:

a. The last 4 digits of elector's social security number.

b. The elector's State-issued driver's license number.

c. The elector's State-issued nondriver identification card number.

§ 5607A. Instructions for completing and returning a mail ballot.

The Attorney General shall prepare a list of instructions to assist an elector voting by mail ballot in properly marking and returning the elector's ballot under this chapter. These instructions shall be known and marked as "INSTRUCTIONS FOR COMPLETING AND RETURNING A MAIL BALLOT". Before each election, the Attorney General shall deliver a copy of the instructions to the Department in sufficient time for the Department to have the instructions printed and delivered to each elector who requested a mail ballot for the ensuing election.

§ 5608A. Voting procedure; execution of statement; return of ballot.

(a) The procedure for completing a mail ballot and returning it to the Department includes all of the following:

(1) An elector who receives a mail ballot under this chapter shall complete the ballot by marking it with the elector's selections and shall place the completed ballot in the envelope marked "BALLOT ENVELOPE".

(2) The elector shall confirm that the information about that elector on the ballot envelope is correct and then sign the self-administered oath and enter the elector's State-issued driver's license number or State-issued nondriver identification card, or the last 4 digits of the elector's social security number.

(3) The elector shall then seal the ballot envelope.

(4) The elector shall return the sealed ballot envelope to the Department before the polls close on the day of the election by doing any 1 of the following:

a. Depositing it, or causing it to be deposited, in a United States postal mailbox, thereby mailing it to the Department.

b. Delivering it, or causing it to be delivered, to the Department.

c. Placing it, or causing it to be placed, in a secure drop-box located in a publicly accessible portion of each Department of Elections Office.

(b) Mail ballots received by the Department before the day of the election may be processed and scanned but may not tabulated until the day of the election.

§ 5609A. Time limit for return of ballot; late ballots.

(a) The Department shall record the date and time of receipt on the ballot envelope of each mail ballot received.

(b) For a mail ballot to be counted under this chapter, the elector shall return the elector's marked ballot to the Department before the polls close on the day of the election.

(c) The Department shall retain unopened any ballot envelope received after the polls close on the day of the election it receives after the polls close on the day of the election until the last day of February next after the election, or longer if directed by proper authority or required to do so by federal law.

§ 5610A. Procedure on receipt of ballot envelope by Department.

(a) Upon receipt of a ballot envelope, the Department shall do all of the following:

(1) Ascertain the name of each elector as it appears on the face of each ballot envelope.

(2) Ascertain from the information on the ballot envelope the election district with whose votes the ballot within it shall be tallied.

(3) Place the ballot envelope in a secure location until such time as it is opened and the ballot within it is counted.

(b) Except as required under this chapter, no person may open or attempt to open the ballot envelope, or change, alter, or attempt to change or alter the ballot envelope, or any writing, printing, or anything on the ballot envelope.

§ 5611A. Counting procedure for ballot envelopes.

Beginning 30 days before the day of the election, election judges within each county, selected by the administrators of the Department in that county, shall count ballot envelopes at the Department's offices in the county as follows:

(1) An election judge shall select the ballot envelopes in order of the election districts within the county.

(2) For each ballot envelope, the election judges shall ascertain whether a challenge has been made under § 5615A of this title.

(3) If no challenge has been made, the election judges shall do all of the following:

a. Open the ballot envelopes in such a manner as not to deface or destroy the statement thereon or the mail ballot enclosed.

b. Remove the ballots from the ballot envelopes.

c. Determine whether the ballots have been properly completed or whether the elector's intent can be determined under § 4972 of this title.

d. Tally any mail votes that were written-in, or that must be counted by hand under § 4972 of this title, on mail vote tally sheets for the election district with whose votes the mail votes are to be counted.

e. Record the proper notations of such votes in the election records for the election district to which they apply.

f. A ballot that a team determines cannot be read by the tabulating equipment or which the tabulating equipment rejects, shall be duplicated under § 5612A of this title.

(4) Once mail votes have been recorded, an election judge shall deposit the voted ballots, rejected ballots, and any mail vote tally sheet that may have been used, in a carrier envelope for the election district with whose votes the mail votes are counted as follows:

a. Each carrier envelope must contain mail ballots, rejected ballots, and tally sheets for no more than 1 election district.

b. Only 1 carrier envelope can be filled at a time.

(5) Once a carrier envelope is filled, it must be sealed by an election judge. The election judge shall sign the election judge's name on each sealed carrier envelope, affirming that the election judge sealed the envelope and that the envelope contains ballots for the election district to which the envelope is assigned. Each sealed and signed carrier envelope shall be placed in a secure location and held there until such time as it is destroyed or moved for further legal process.

(6) The results of the mail ballots shall not be extracted or reported before the polls have closed on the day of the election.

§ 5612A. Preparing mail ballots for tabulation.

(a) The Department may open ballot envelopes in public meetings beginning 30 days before the day of the election in order to prepare them for tabulation. The Department shall notify each party on the ballot that they may have challengers at the meetings during which the Department opens the ballot envelopes. The challengers may challenge ballots as provided elsewhere in this title.

(b) The Department shall appoint teams composed of an equal number of Democrats and Republicans to open and duplicate ballots.

(c) The teams shall open ballots by election district, check them off against the list under § 5618A(b)(1) of this title, duplicate ballots that the team determines that the tabulating equipment cannot read and then secure the opened and duplicated ballots along with the envelopes in a carrier envelope. The teams shall record the number of the carrier envelope and the election district number on a log sheet that it shall also secure in the same carrier envelope.

(d) Teams shall duplicate ballots by marking them according to the voter's intent as shown on the ballot marked by the voter. If a team cannot determine a voter's intent, they shall consult the county director and county deputy director for advice and guidance.

(e) When duplicating ballots, the teams shall assign the same unique identifier to the ballot that they duplicate and the duplicated ballot. After the team has duplicated ballots for an election district, the team shall put the ballots that the team duplicated in a separate envelope and put it in the carrier envelope for the election district and the team shall put the duplicated ballots with the ballots that the Department shall tabulate on the day of the election.

(f) The Department shall secure the carrier envelopes in locked cabinets until opened in a subsequent public meeting to insert additional ballots or to tabulate the ballots on the day of the election.

§ 5613A. Carrier envelope specifications; carrier envelopes as ballot boxes.

(a) The Department shall purchase envelopes to be used as carrier envelopes which must be all of the following:

(1) Designed to securely protect the contents from tampering, removal, or substitution without detection.

(2) Large enough to accommodate multiple mail ballots cast in the election.

(b) For all purposes of this title, carrier envelopes are considered the official ballot boxes for mail votes cast during a given election and must meet all of the following requirements:

(1) Contain voted mail ballots from a single election district.

(2) Be labeled to reflect the election district whose mail ballots are held inside.

(3) Ensure the security of the ballots in the event they must be moved for the purposes of certifying an election or recounting votes cast in an election.

(c) A sealed carrier envelope may be reopened only when necessary to certify an election or recount votes cast in an election.

(d) In the event the Department must move mail ballots for the purposes of certifying an election, or recounting votes cast in an election, it shall select the carrier envelopes for the affected election districts and move them, in a secure fashion, to the location where the carrier envelopes will be opened and the votes inside inspected.

(e) Upon completion of any inspection of votes under this section, mail ballots must be returned to the carrier envelopes from which they were removed and all of the following must be done with the carrier envelopes:

(1) Resealed in a secure manner, or be placed in another security envelope, for the purposes of securely protecting the contents thereof from tampering, removal, or substitution without detection.

(2) Placed in a secure location and held there until such time as it is destroyed or moved for further legal process.

§ 5614A. Envelopes in general; approval by Attorney General.

The Attorney General shall personally approve each kind or type of envelope for use under this chapter. The Department may not purchase, use, have printed upon, mail, or deliver any envelope for use under this chapter unless the type or kind of the envelope has first been approved personally by the Attorney General.

§ 5615A. Challenges.

(a) A mail ballot may be challenged for any of the following:

(1) The same causes and in the same manner as provided in this title for other voters.

(2) That the statement in the center of the face of the ballot envelope is not signed as required under § 5608A(a)(2) of this title.

(3) The ballot envelope does not contain the elector's State-issued driver's license number or State-issued nondriver identification card, or the last 4 digits of the elector's social security number, as required under § 5608A(a)(2) of this title.

(b)(1) If a challenge is made under paragraph (a)(1) of this section, an election judge shall return the ballot to its ballot envelope, shall mark the ballot envelope as "CHALLENGED" and shall set the ballot envelope aside in a secure location for consideration at a later time as provided elsewhere in this title.

(2) If a challenge is made under paragraph (a)(2) of this section, an election judge shall mark the ballot envelope as "CHALLENGED" and shall set the ballot envelope aside in a secure location for consideration at a later time as provided elsewhere in this title.

(c) All challenges to mail ballots voted in a particular election district must be resolved before the counting of votes in that election district may be considered complete. Any challenge not resolved by the election judges within a reasonable time of the challenge having been made must be referred for resolution to the county director and county deputy director of the Department in the county where such election district is located.

§ 5616A. Rejected ballots.

(a) No vote shall be accepted or counted if any of the following occurs:

(1) The signature of the voter that appears on the front of the ballot envelope is found to have been altered or the ballot envelope is not signed as required under § 5608A(a)(2) of this title.

(2) The voter is not a duly registered elector in this State.

(3) The ballot envelope is open.

(4) It is evident that the ballot envelope has been opened and resealed.

(5) It is evident that the ballot envelope has been tampered with or altered.

(b) If the ballot envelope has not been opened at the time an election judge decides that the offered ballot contained therein should not be accepted or voted for any of the reasons under subsection (a) of this section, it must not be opened and the election judge shall endorse on the ballot envelope "REJECTED" and state the reason therefore.

(c) If the ballot envelope has been opened at the time an election judge decides that the offered ballot contained therein should not be accepted or voted for any of the reasons under subsection (a) of this section, the ballot must be returned to its ballot envelope and the election judge shall endorse on the ballot envelope "REJECTED" and state the reason therefore.

(d) Whenever it is made to appear by due proof to an election judge that any voter, who has marked and forwarded the voter's ballot, has subsequently died, the ballot envelope containing the ballot must not be opened and the election judge shall record on the ballot envelope "REJECTED, DEAD" and must be preserved and disposed of as other rejected ballots.

(e) Whenever a ballot has not been counted but has been rejected under this section, the appropriate notation must be made on the mail ballot tally and the number of ballots rejected must be noted on the certificates of election.

(f) Ballots rejected under this section must be deposited in a carrier envelope for the election district to which they apply.

§ 5617A. Validity of a voter's mail ballot for wrong district.

If a voter marks and returns a mail ballot for an election district other than the one in which the voter is a resident and a duly registered elector, such ballot must not be adjudged invalid but, as indicated by the marking of the ballot by the voter, shall be counted as a vote for every candidate appearing thereon who is a candidate for an office to be duly voted for in the elector's election district.

§ 5618A. Required records.

(a) The Department shall maintain records providing for the prevention of fraud and to make possible the tracing and detection of any attempt to do so. Such records must include all of the following entries:

(1) The name of the elector.

(2) The address at which elector is registered.

(3) The address where the ballot is to be mailed.

(4) The date the application for a mail ballot is received by the Department.

(5) The elector's election district and representative district.

(6) The ballot envelope identification number.

(7) The date the ballot is mailed or delivered to the elector.

(8) The date the ballot is returned.

(b)(1) The Department shall compile from its files a list of names and addresses of all applicants for mail ballots and shall send current and complete copies of this list, without cost, to all political parties with candidates on the ballot in the forthcoming election.

(2) The Department shall provide the lists under paragraph (b)(1) of this section no later than 2 weeks before the date of the election and copies of the lists must be mailed on the same date to the respective chairs of each political party involved in the election.

(3) The Department shall also make available to representatives of all political parties, comparable information from the file for the list under paragraph (b)(1) of this section, at each office of the Department during the remaining 2 weeks before the election. This information may be recorded by representatives from the political parties from the daily records of the Department with the cooperation and assistance of Department employees.

§ 5619A. Duties of Department of Elections; political balance of election judges; security.

(a) The Department shall ensure that each panel of election judges selected to officiate the procedures required under this chapter represent a politically balanced cross section of the major political parties participating in the election for which the mailed ballots are being counted.

(b) The Department shall promulgate rules to ensure the security and integrity of the procedures required under this chapter and that the counting process for mail ballots is not subject to improper influences.

§ 5620A. Logic and accuracy testing of mail ballot tabulating equipment; authority of the State Election Commissioner.

(a) The State Election Commissioner, in consultation with the Department offices, shall promulgate rules relating to logic and accuracy testing of mail ballot tabulating machines.

(b) Rules promulgated under this section must ensure all of the following:

(1) All machines are thoroughly tested immediately following maintenance and programming to determine all of the following:

a. The voting system is properly programmed.

b. The election is correctly defined on the voting system.

c. All of the voting system input, output, and communication devices are working properly.

(2) Any machine deemed unsatisfactory is recoded, repaired, or replaced and must be retested.

(3) Machines are publicly tested before use to ascertain that they will correctly count votes cast for all offices and all measures in the upcoming election.

(4) Public notice of public tests is given at least 7 days before the tests being conducted.

(5) The resetting and sealing of each publicly tested machine is witnessed by the election officials, representatives of the political parties, and any candidates or candidate representatives who is in attendance.

(6) Each publicly tested machine is secured following the test in a state of readiness until the day of the election.

(7) Records are kept of all pre-election testing of each mail ballot tabulating machine which shall be present and available for inspection and reference during public pre-election testing of that machine by any person in attendance during the testing.

§ 5621A. System for voters to determine status of their mail ballots.

The State Election Commissioner, in collaboration with the Department offices, shall establish a free access system accessible via the Internet through which a person who applied for a mail ballot can determine whether or not the ballot application was received, when the ballot was transmitted, when the voted ballot was received by the Department, and whether or not the ballot was counted.

Section 2. Amend § 4502, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4502. Form and designation of ballots.

(d) Absentee or mail ballots may be laid out with candidate names under an office title. If this form is used, party logos ~~shall~~ are not to be used and the political party of each candidate shall be listed beside or below the name of each candidate. The candidates shall be listed in the order specified in subsection (a) of this ~~section above.~~ section. Except, that in a primary election the candidates shall be listed in alphabetic order and the political party shall be listed for each office.

Section 3. Amend § 4503, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4503. Creating ballots.

The Department shall create the ballots to be used in the voting devices and print or cause to have printed sufficient mail and absentee ballots for any election conducted by the Department under the provisions of this title.

Section 4. Amend § 4505, Title 15 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 4505. Substitution of candidate's name after creation of ballots.

Whenever a supplemental certificate of nomination is filed naming a substitute candidate, as elsewhere provided in this title, the Department shall promptly ~~provide~~ notify electors using absentee or mail ballots of the substitution and do either of the following:

(1) Provide new ballots, if there is sufficient time before the ~~election, or take~~ election.

(2) Take other appropriate measures if there is insufficient time before the election to provide new ballots.

Section 6. This Act applies to elections that occur after July 1, 2022.