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April 8, 2021

TO: Chairman Vedaa and Members of the Senate Government and Veterans Affairs Committee

FR: Jim Silrum, Deputy Secretary of State on behalf of Secretary of State Al Jaeger

RE: HB 1253 – Election Administration

This 112-section bill, with the proposed Senate amendments, is a comprehensive election administration bill that creates one new subdivision and four new sections, amends 106 sections, and repeals four sections of the North Dakota Century Code (NDCC). All but two of the sections are found in Title 16.1, which is the Elections Title in the NDCC. The two sections not in Title 16.1 will grant the Secretary of State the authority to conduct background checks for cybersecurity purposes on the employees of the office whose work involves the personally identifying information such as dates of birth, driver's license numbers, social security numbers, and employer identification numbers of the people and businesses of North Dakota.

This bill essentially does three things.

1. By far the largest number of amendments in the bill modernize terminology consistent with technology and terms used in other sections in the NDCC.
2. The bill addresses remedies required by recent litigation.
3. Lastly, the bill addresses options for election administration that will allow the state to step forward into the future appropriately and securely.

This written testimony covers the details of the substantive portions of this bill by section, but there are many suggested amendments that simply change the wording in the NDCC to what represents more legally proper or modern terminology. The following is a list of those changes throughout the bill.

- The sections in Title 16.1 often use several different terms when referring to the hardware, firmware, and software that make up what is known in the election industry as a voting system. This bill amends these different terms to "voting system" for the sake of consistency.
 - "Electronic" is removed 93 times because all voting systems are electronic.
 - "Counting machine" is removed 24 times.
 - "Automatic tabulating equipment" is removed eight times.
- Ten references to a specific type of voting system hardware known as a "direct-recording electronic" (DRE) voting machine have been removed because all voters in North Dakota cast a paper ballot. The official ballot on a DRE is often only stored electronically.
- "Person" is amended to "individual" 62 times because "person" also refers to a corporation and corporations are not allowed to run for public office except for official county newspaper.
- Antiquated language is updated for the sake of clarity.
- Existing practice is codified, e.g., candidates may file documents electronically rather than by mail.
- Amending incorrect references to sections in the NDCC within other sections.
- Moving paragraphs following subsections to the paragraph before the subsections.

The remainder of the testimony references those substantive changes not covered in the list above.

Section 1 at the top of page 2 and **Section 111** on page 82 include the amendments necessary so that the Secretary of State may engage the Bureau of Criminal Investigation to conduct background checks on office employees for reasons of cybersecurity.

Section 2 on page 2: moves a definition for “candidate” from NDCC 16.1-08.1-01 to ch. 16.1-01 so that the definition applies throughout the Title. **Section 43** on page 35, lines 3-15 removes the same definition from § 16.1-08.1-01 in the chapter that only deals with campaign disclosure.

Section 4 on page 3 and **Section 85** on page 65: the amendment in Section 4 is to address a situation that has occurred in recent elections administered in Minot in which voters have come into the polls near to the time the polls would close and then have taken 90 minutes to 2 hours to mark and cast their ballots. This has held up the election results from the polling place. The solution offered provides a fair chance to the voter to either cast their ballot 30 minutes after the last voter received his or her ballot and the time of poll closing or to continue marking the ballot and securely cast it so that it will be counted by the members of the canvassing board six days after the election. This specificity is to ensure that voters living with disabilities are allowed enough time to mark and cast their ballot if they arrive to vote near the closing of the polls. This language had also been in Section 85 in the original bill, but it is only needed once in the Title and chapter 16.1-01 is the proper place for it to belong.

Section 8 on page 5, lines 23 and 24: additional wording is added to NDCC § 16.1-01-08 to clarify that only a court may resolve a factual dispute regarding a candidate’s residency. In two separate lawsuits filed against the Secretary of State in 2020, the plaintiffs argued that the Secretary of State should have removed a candidate from the ballot because the candidate was not qualified to hold office due to residency. In both cases, the court made the necessary decision. Although there now exists court rulings on this section of law, the amendments are to pattern the law after the rulings for the sake of clarity.

Sections 9 and 10 on pages 6 and 7: two sentences are added to subsection 5 of NDCC § 16.1-01-09 and subsection 7 of NDCC § 16.1-01-09.1 requiring sponsoring committees for initiative, referral, and recall petitions to provide a list including the names and contact information of those who circulated the submitted petition. In 2020, the Secretary of State requested these lists from sponsoring committees because of questions concerning the qualifications of the circulators. However, the sponsoring committees chose not to provide these lists because the law did not require them to do so.

Section 11 on page 8, lines 17 and 18 and lines 23-26 change the penalty for willful destruction of ballots, ballot boxes, etc. when not authorized by law to do so or for a cyber attack to attempt to prevent voting from a class A misdemeanor to a class C felony. (An example of a cyber attack could be an attempt to disable the state’s power grid during an election.)

Section 13 on page 10: the amendment appropriately instructs when Legislative Council is to begin the process for determining the fiscal impact of an initiated or referred measure. Under the current wording, Legislative Council could be required to determine the fiscal impact of a measure before it is certified for inclusion on a ballot.

Section 14 on page 11, lines 1-12: this further amends the section of law that was added this session in HB 1256 relating to the prohibition on the use of private funds for the administration of elections. Although both the House and Senate passed that bill, the discussion in the Senate revealed some unintended consequences that the new law could establish. The amendment places some appropriate parameters on this law so that it does not prevent lunch being brought to poll workers as an example.

Section 15 on page 11, lines 19-21: the added language is to codify what should already be occurring. The Secretary of State is to provide documentation and training for those granted access to the Central Voter File and this training and documentation must be followed when using the system.

Section 17 on page 12, line 12: requires new voters to be added into the Central Voter File by the County Auditors before the county canvassing boards meet on the sixth day after the election. On lines 17 and 18, the Secretary of State is to search the Central Voter File before the state canvassing board meets to determine if any voter voted more than once in the election. This expedited timeline is now possible because of the electronic pollbooks that are utilized statewide.

Section 20 on page 14: County Auditors are required to post voting history in the Central Voter File before the end of the period during which an election may be contested. The contest period referenced in NDCC § 16.1-16-04 is five days after the certification of a recount or 14 days after the final certification of results if no recount is conducted. This is also possible through the utilization of electronic pollbooks.

Section 22 on page 15, lines 16-27: the added language is to define what constitutes the “pollbook” when electronic pollbooks are used.

Section 23 on page 16, lines 21 and 22: the added language instructs the County Auditor to inform the district party chair when an appointment of an election judge is made by the County Auditor because no names for election judges were received from that district party. This is already happening in most cases.

Section 24 on page 17, lines 10-13 provides for a penalty when an election official places a name on a ballot when that candidate does not meet the qualification to be included on the ballot.

Section 25 on page 17 and **Section 56** on pages 50 and 51: the added language requires the Secretary of State in a primary election to place the word “endorsed” near the name of a candidate who was endorsed by the candidate’s political party and “petition” near to the name of a candidate whose name was placed on the ballot under a party’s designation by circulating petitions. In the original bill, this had been added in § 16.1-06-04, but the Senate amendments remove it since it is only needed once in the code.

Section 35 on page 25, lines 23-25: on the absentee / mail ballot application form, language is added (by Senate amendment) next to the applicant’s signature to inform them that their signature on the application will be compared with the signature on the envelope of the returned ballot.

Section 35 on page 26 and **Section 37** on pages 27-29: currently, only those voters who qualify as military and overseas voters, may receive their absentee ballot by secure electronic delivery. The state has provided this service to our residents temporarily stationed far away from their North Dakota homes for nearly 30 years. As soon as the technology is finalized, it is time to offer that same option to voters living here in the state, however, with a slight twist. Under these amendments, a voter could request that their ballot be delivered to them electronically, they could mark the ballot in the privacy of their own home, come to their polling place during early voting or on election day, sign in at the election clerk’s table, take the marked ballot to the Express Vote ballot marking device where their electronic ballot will be converted into a paper ballot with their selections marked, and then cast the ballot in the voting system tabulator in the same manner as other voters who mark their ballots while at the polls.

The Secretary of State’s office believes this could reduce the number of absentee and mail ballots that are cast because it would allow the voter time to mark their ballot in privacy but allow them the experience of voting in a polling place in an efficient and secure manner. This is also necessary because of the frustrations some voters experienced with the service provided by the USPS during the 2020 election cycle. Although 96% of the election mail was delivered according to schedule, that meant that 4% was not. (Statistics provided by USPS.) Preventing any qualified elector from voting is not acceptable.

Additionally, those voters living with disabilities have often wondered when they would be allowed the same access to the ballot as military and overseas voters. On page 28, lines 8-19, the members of the House of Representatives agreed that it is now time to grant voters living with disabilities the access to the ballot that they have long desired. To make the language of the law more inclusive, the Senate amendment changes “Any voter who is blind, visually impaired, or print disabled” with “Any qualified elector living with a disability

that prevents the elector from reading or marking the ballot without assistance.” The greatest challenge for voters living with disabilities is to travel to a polling place. North Dakota has made the ballot accessible to these voters when they can make it to a polling location since 2006, it is now time to give these voters the same accessibility when voting at home.

Section 37 on page 29, lines 26-28: the added subsection is to make it abundantly clear in law that an absentee ballot is never given to a voter without first receiving a valid application from a qualified elector.

Sections 39 and 41 on pages 30-32: the added language outlines the process for the County Auditor to follow in contacting the applicant if the signature on the absentee ballot application does not match with the signature on the envelope containing the marked ballot. The Secretary of State faced a lawsuit filed during the late spring of 2020 because state law did not allow a voter whose ballot was rejected to have the opportunity to confirm the validity of the signatures so the ballot could be counted. The language to be added complies with the court’s ruling in the case.

Section 40 on page 31, line 15: changes the “may” to “shall,” recognizing that all counties have been provided a high-speed digital scanner for the tabulation of the votes on the ballots submitted by absentee or mail ballot voters. The through-put on the high-speed scanners are at least 40 ballots per minute as opposed to the polling place scanner that allows fewer than five ballots per minute, individually fed, rather than by the sheet feeder on the high-speed scanners.

Section 47 on page 41, line 19: voters signing candidate petitions would be required to print as well as sign their names so the election official validating the signatures can read the names.

Section 47 on page 42, lines 1-8: provides clarity that the Affidavit of Candidacy must be filed along with either the Certificate of Endorsement or petition before the candidate’s name may be placed on the ballot.

Section 50 on page 44 and **Section 63** on page 53: the added language is for clarity that the documents filed by a candidate must meet all applicable requirements before the candidate’s name can be placed on the ballot and what is to occur if a mistake was made in validating the documents after the filing deadline for the primary election. Before the filing deadline for the 2020 primary election, the Stark County Auditor failed to ensure that enough signatures were included on the petition for a candidate running for County Commission. The candidate also did not file the required Affidavit of Candidacy until after the primary election. Even though this should not have occurred, nothing was in law to remedy the situation. This would correct that oversight.

Section 52 on pages 46 and 47: the current wording of subsections 4-6 of NDCC § 16.1-11-18 are appropriately being moved to a new section being added to ch. 16.1-12. Ch. 16.1-11 deals with primary elections and ch. 16.1-12 deals with the period between the primary and general elections. The new section is found in **Section 73** beginning on page 58 and addresses a vacancy that occurs after the nominations have been made in the primary election.

Section 64 on page 54: the Senate amendments change the requirements in vote by mail counties that the applications for the ballot must be mailed to each active voter in the Central Voter File as well as those that are qualified to vote for the first time, e.g., individuals who will turn 18 before the election.

Section 66 on page 54: adds clarity to ch. 16.1-11.1, Mail Ballot Elections, to ensure that the reader understands that the only difference between absentee voting and voting by mail is that the application is provided to the voter in vote by mail counties. All other aspects are the same.

Sections 89 and 90 on page 67: the Senate amendments add a requirement for a polling place poll worker to deliver the election results from the polling place to the County Courthouse within three hours of the closing of the polls.

Section 91 on page 68 and **Section 94** on page 71: the new voting system purchased by the state not only captures an image of the entire ballot cast by the voter, but the individual contests included on those ballot images are separated out as well for the purpose of adjudicating the legitimate write-in votes that were cast by the voters for each contest. This allows for the adjudication process to occur in the County Auditor's office by looking at these images when the election worker from the polling place returns the election materials after the polls have closed. The counting of write-in votes used to take a considerable amount of time for the poll workers at the end of a very long day. That work can now be completed in a more efficient manner than in past elections.

The sections of the NDCC that are to be repealed by **Section 112** are:

1. **NDCC § 16.1-06-10.1 – Electronic counting machines authorized - Sharing of machines.** This is a redundant section of law.
2. **NDCC § 16.1-07-11 – Submitting ballot to inspector of elections.** This is unnecessary because the appropriate contents are covered in NDCC § 16.1-07-12.1.
3. **NDCC § 16.1-07-13 – Registration of absent voters' ballots on electronic voting systems.** This is unnecessary because all ballots are tabulated by the state's voting system.
4. **NDCC § 16.1-13-24 – Voting on electronic voting system devices.** Unnecessary.

On behalf of the Secretary of State and his election team, we request the committee to vote for a unanimous **Do Pass** recommendation.