

OFFICE OF POLICY AND LEGAL ANALYSIS

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To: Veterans and Legal Affairs Committee

From: Janet Stocco, Legislative Analyst

LD 941 **An Act To Protect the Privacy of Absentee Voters** (*Representative Faulkingham*)

SUMMARY

This bill requires that an absentee ballot be wrapped in a blank, opaque sleeve of paper or other material of sufficient thickness to prevent the writing on the ballot from being visible when placed in the return envelope when it is issued to a voter.

ISSUES RAISED AND AMENDMENTS PROPOSED AT PUBLIC HEARING

A. Bill sponsor.

The bill sponsor explained that the opaque privacy sleeve is intended to prevent an election official from observing how an absentee voter voted when the absentee ballot is removed from the return envelope by an election official because, at that moment in time, the election official knows (from the information on the return envelope) the name of the absentee voter.

B. Secretary of State, Maine Town & City Clerks' Association, Maine Municipal Association.

Secretary of State Bellows, the Maine Town & City Clerks' Association and the Maine Municipal Association provided the following information related to the privacy-sleeve requirement:

1. ***Ballot preparation and processing:*** They believe a privacy sleeve may be unnecessary to prevent election officials from viewing a particular absentee voter's choices because both state and local ballots are generally prepared in a manner that causes the voter's choices not to appear on the outside of the folded ballot. When election officials process absentee ballots, they separate the folded ballots from the return envelopes and place them in a bin. Only after a number of folded ballots have been placed in the bin will the ballots be removed, unfolded, and either fed into a tabulation machine or bundled for hand-counting after the polls close.

Analyst note: [21-A M.R.S. §759\(2\)](#) directs that, when processing absentee ballots on election day, the warden first determines whether the voter's name is checked off on the incoming voting list because the voter voted in person. Then, "The warden shall then announce the name of each absentee voter who has not voted at the election and remove each ballot from its envelope without destroying the envelope or unfolding the ballot." According to Deputy Secretary Flynn, the Secretary of State's procedures issued to municipal clerks for processing absentee ballots on election day and for early processing of absentee ballots require election officials to place folded absentee ballots in a bin. Only after multiple, folded ballots have been placed in the bin, may local election officials then remove the ballots and unfold them.

2. ***Postage costs:*** The addition of an extra privacy sleeve might increase municipal and voter postage costs if the weight of the privacy sleeve causes the absentee ballot to incur extra postage charges. In addition, the costs of providing the privacy sleeve must be borne either by the Secretary of State or the municipality.

3. **Administrative burden (time):** The time required to fold a sheet of paper around an absentee ballot and later to remove that sheet of paper when processing that ballot, although short for each individual ballot, will have a large, cumulative impact on municipalities in which thousands or tens of thousands of absentee ballots are cast in an election.

C. Office of the Governor.

The Governor’s Deputy Legal Counsel submitted testimony urging the Committee not to enact legislation requiring that “otherwise eligible voters” will have “their ballots rejected on a technicality.”

D. Proposed Amendment - League of Women Voters of Maine.

The League of Women Voters of Maine proposed amending the bill to replace the privacy sleeve with either (1) a requirement that return envelopes furnished by the Secretary of State under [21-A M.R.S. §752](#) are of sufficient weight to protect voter privacy or (2) to require that written, uniform absentee ballot instructions be provided to voters and include a statement that the voter may, at the voter’s discretion, fold the instruction sheet around the absentee ballot before placing it in the return envelope.

ADDITIONAL INFORMATION

A. Secrecy sleeve laws in other states.

According to NCSL, in May 2020, 16 states’ laws require absentee voters to be provided a secrecy sleeve—*i.e.*, “a paper document intended to protect the voter’s privacy by separating their identity and signature from their [absentee or mail-in] ballot.” See [Voting Outside the Polling Place Report](#) Table 13 (*attached*).

Whether a voter’s absentee or mail-in ballot will be rejected in another state if it is returned without the secrecy sleeve depends on the precise language of the applicable statute. In September 2020, for example, the Supreme Court of Pennsylvania interpreted Pennsylvania’s privacy sleeve statute as mandatory, preventing election officials from accepting and counting mailed-in ballots returned within the secrecy sleeve. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). The relevant Pennsylvania statute provided:

[After] receiving an official mail-in ballot, the mail-in elector shall, in secret, proceed to mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector.

25 Pa. Cons. Stat. §3150.16(a) (2020). A related statute required election officials to “declare void” any ballot if the “Official Election Ballot” envelope “contain[ed] any text, mark or symbol which reveals the identity of the elector . . .” 25 Pa. Cons. Stat. §3146.8(g)(4)(ii). Reading these requirements together, the Court reached “the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified” because the identity of the elector is revealed. *Id.*

TECHNICAL AND DRAFTING ISSUES

1. **Sleeve not required when absentee ballot returned.** Unlike the Pennsylvania law discussed above, LD 941 does not require that a voter *return* an absentee ballot within the secrecy sleeve; instead, the bill requires only that the absentee ballot be *issued* within a blank sleeve of paper.

2. **Who provides the secrecy sleeve?** The bill does not specify whether the Secretary of State must provide the paper that will be used as a secrecy sleeve when the Secretary furnishes municipalities with absentee ballots and return envelopes under [21-A M.R.S. §752](#) or whether the municipal clerk must provide the secrecy sleeve when issuing absentee ballots and return envelopes to voters under [§753-B\(1\)](#).
3. **Secrecy sleeve only required if ballot issued to voter?** The bill requires only that a secrecy sleeve be included when an absentee ballot is “issued to a voter.” Under [§753-B\(1\)](#) of current law, however, upon receipt of a valid application, a municipal clerk “shall immediately issue an absentee ballot and return envelope by mail or in person to the applicant *or to the immediate family member or to a 3rd person designated in a written application* or request made by the voter.”
4. **UOCAVA ballots.** Several of the procedures for absentee ballots issued to UOCAVA voters differ from the general absentee ballot procedures. Does the committee intend to apply the secrecy sleeve requirement to UOCAVA ballots?

FISCAL IMPACT

Not yet determined.

States that are Required to Provide Secrecy Sleeves for Absentee/Mail Ballots

5/5/2020

Our organization does not run elections and cannot provide legal advice. If you are a voter looking for assistance, please contact your local election official. You can find your local election official's website and contact information by using this database from the [US Vote Foundation](#).

This table is part of NCSL's [Voting Outside the Polling Place report](#).

Many states have statutory requirements detailing what election officials must include in the mailings that go out to voters who have requested absentee ballots or who will receive mail ballots automatically. Sixteen states require that absentee voters be provided with a secrecy sleeve. A secrecy sleeve—sometimes known as a privacy sleeve, inner envelope or identification envelope—is a paper document intended to protect voters' privacy by separating their identity and signature from their ballot. After completing a mail or absentee ballot, a voter places it inside the secrecy sleeve, which then goes inside the return envelope.

Other states or jurisdictions may choose to use secrecy sleeves. In Maryland, for example, local election boards can choose whether to include them (MD Code, Election Law, § 9-310), and Colorado's ballot mailings include an instruction sheet that can double as a secrecy sleeve if the voter so chooses.

The additional paper can increase the cost of ballot mailings, however. And secrecy sleeves are unnecessary if the election jurisdiction has a different process to ensure a voter's privacy when ballots are opened.

The states in the table below are those that require providing a secrecy sleeve to absentee voters.

State	Statute
Alaska	AS § 15.20.030
Florida	West's F.S.A. § 101.64
Georgia	Ga. Code Ann., § 21-2-384
Hawaii	HRS § 15-6
Kentucky	KRS § 117.085
Minnesota	M.S.A. § 203B.07
New Hampshire	N.H. Rev. Stat. § 657:7
New Jersey	N.J.S.A. 19:63-12
New York	ELN § 7-122
North Dakota	NDCC, 16.1-07-08
Ohio	R.C. § 3509.04
Pennsylvania	25 P.S. § 3146.4
Texas	V.T.C.A., Election Code § 86.012, § 86.013
Virginia	VA Code Ann. § 24.2-706
Washington	West's RCWA 29A.40.091
West Virginia	W. Va. Code, § 3-3-12